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Supreme Court, U.S.
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No. __

In The

Supreme Court Of The United States

October Term, 1991

CENTRAL GMC, INC.

Petitioners,

v.

GENERAL MOTORS CORPORATION

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether it is error for a Court of Appeals, in a complex franchise termination case, to grant judgment to a party which has lost a motion for summary judgment at trial and which has claimed throughout that summary judgment was precluded because genuine disputes exist concerning facts material to the critical liability question.

PARTIES BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Central GMC, Inc., Petitioner herein and plaintiff below, and General Motors Corporation, Respondent herein and defendant below.

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Central GMC, Inc., the Plaintiff in this case, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, to review the judgment entered in that Court on October 7, 1991.

OPINIONS BELOW

On October 7, 1991, after consideration by a three-judge panel, the Fourth Circuit issued an opinion and judgment reversing the District Court's judgment in this case and awarding summary judgment to the defendant, General Motors Corporation. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 946 F.2d 327 (1991), and is reproduced at pages 1 through 15 of the appendix. The opinion and order on liability issued by the District Court for the District

of Maryland is reproduced at pages 47 through 63 of the appendix. The opinion on damages and judgment order issued by the District Court for the District of Maryland is reproduced at pages 16 through 46 of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit reversing the District Court's judgment was entered on October 7, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 15-209 of the Maryland Transportation Code provides, in pertinent part, as follows:

> (a) *Manufacturers.* A manufacturer may not terminate, cancel or fail to renew the franchise of a dealer, notwithstanding any term or provision of the franchise, unless:
>
> (1) The dealer has failed to comply substantially with the reasonable requirements of the franchise;

Section 11-125 of the Maryland Transportation Code defines "franchise" as:

> A written arrangement, whether or not for a definite period, in which a manufacturer, distributor, or factory branch grants to a dealer or distributor a license or right to use a trade name, trademark, service mark, or related characteristic in the sale, leasing, or servicing of new vehicles.

STATEMENT OF THE CASE

Central GMC, Inc. (Central) is a truck dealer located in Landover, Maryland. General Motors Corporation (GM) is a motor vehicle manufacturer. Until December 31, 1987, Central was franchised to sell and service heavy duty trucks and parts

manufactured and distributed by GM. On that day, GM terminated Central's heavy duty truck franchise.

Central and GM executed a Dealer Sales and Service Agreement (the Agreement) that became effective November 1, 1985. Under the Agreement, GM granted Central a non-exclusive right to

> (a) buy the new GMC Truck motor vehicles identified in the Motor Vehicle *Addendum* hereto and related parts and accessories; and
>
> (b) identify itself as an authorized GMC Truck dealer at the location approved by General Motors.

Attached to the Agreement were a number of Addenda. One of these gave Central the non-exclusive right to market GM heavy duty truck products. The other Addenda granted Central the right to market medium and light duty trucks. Central consistently maintained an excellent performance record as a GM truck dealer.

On December 10, 1986, GM notified all heavy duty truck dealers, including Central, that GM had entered into a joint venture with Volvo, and that the "culmination of the joint venture will further strengthen GMC Truck's presence in the [heavy duty truck] market segment."[1] GM notified Central that its heavy duty "Addendum" had been "canceled as of December 31, 1987."

On December 30, 1987, Central initiated proceedings against GM before the Maryland Motor Vehicle Administration (MVA) under Maryland's Franchise Termination Act, Md. Transp. Code Ann., §15-209, claiming that GM had wrongfully terminated Central's heavy duty truck franchise. On January

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[1] On December 23, 1986, GM notified its dealers that the heavy duty Addendum to the Agreement "will expire as of December 31, 1987," and that GM would contact certain dealers in the future regarding assistance which would be offered by GM to dealers whose franchises were terminated.

29, 1988, GM removed the proceedings to the District Court on the grounds of diversity of citizenship, pursuant to 28 U.S.C. §1332. Following removal, the parties filed cross-motions for summary judgment on the issues related to liability.[2] The legal questions framed by the facts were whether Central's heavy duty truck "Addendum" constituted a "franchise", and, if so, whether GM had "terminated" that franchise, within the meaning of the Maryland Transportation Code. On May 4, 1988, following a full hearing, the Court granted Central partial summary judgment, finding that GM had wrongfully terminated Central's heavy duty truck franchise.

The Court rejected GM's contention that it had not terminated a franchise, but merely discontinued a product, as an argument which "exalts form over substance." (App. at 56). The Court found that GM treated its heavy duty truck business as a separate business from its light and medium duty truck business. (App. at 56-57). The Court found as fact that GM's purported "withdrawal" from the heavy duty truck market "was neither complete nor was it nondiscriminatory." (App. at 56). The Court found that "GM continues to manufacture its Brigadier heavy-duty trucks, and it did so as of the time it canceled this dealer's franchise." (App. at 56). "GM's conduct while it has been reorganizing itself in the marketplace," the Court continued, "demonstrates ... precisely the type of harm which the statute by the Maryland legislature seeks to address and prohibit." (App. at 57). In undertaking this "reorganization," the Court held, "GMC acted in a manner that under Maryland's statute is without just cause. It terminated Central GMC in a manner that the statute expressly addresses. It acted in a highly discriminatory fashion." (App. at 58). Accordingly, the Court held, "there has been a wrongful termination of [Central's heavy

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[2] Central's motion was filed after GM's, and was titled a Motion for Partial Summary Judgment. GM initially filed a pleading styled as a Motion to Dismiss. However, by letter dated March 24, 1988, GM requested that its motion be considered as one for summary judgment.

duty truck] franchise..." (App. at 59). The Court ordered that a trial be held on "the fair value" of Central's terminated heavy duty truck franchise "as a going concern." (App. at 17).

Trial on the value of Central's terminated heavy duty truck franchise took place from June 11, 1990 to June 19, 1990. Following its conclusion, on July 5, 1990, the Court issued a lengthy opinion and order, by which it awarded Central judgment in the amount of $1,850,701 as payment due under Md. Transp. Code Ann. §15-209, and $277,605 as prejudgment interest.

GM appealed, and argued before the Fourth Circuit that Central only had one franchise, contained in the Dealer Agreement and all of the Addenda thereto. GM also contended that, if Central was deemed to have a separate heavy-duty truck franchise, GM had not terminated that franchise, within the meaning of Md. Transp. Code Ann., §15-209, because its discontinuation of heavy duty truck products was complete and non-discriminatory. GM argued in its Brief that, on the one hand, the "undisputed facts" demonstrate that Central's heavy duty truck franchise was never terminated, and, on the other hand, that issues of fact were disputed and the District Court should not have granted summary judgment. At the May 4, 1988 hearing before the District Court, GM also argued that, "At a minimum ... [there] is a question of fact as to whether [the] heavy duty addendum is a separate franchise which was terminated."

The Fourth Circuit reversed the District Court's holding that the heavy duty Addendum granted Central a separate franchise for heavy duty trucks. The Court stated:

> One written arrangement, the GMC Dealer Sales and Service Agreement, governs the relationship between GMC and Central. This agreement provides Central with the right to use the GMC trademark. All the trucks distributed to Central under the Agreement

> were sold under a single trade name, "GMC Truck." The Agreement also gave Central the right to identify itself as "an authorized GMC Truck dealer." Plainly, this evidence indicates that Central has one statutory franchise in GMC Trucks and that the sale of heavy duty trucks was simply one part of that franchise.

(App. at 7). The Fourth Circuit held that, under Md. Transp. Code Ann. §11-125, the form of the written agreement mandated the conclusion that, because it had one GM Dealer Sales and Service Agreement, Central had only one GM franchise. Accordingly, the Court, granted summary judgment to GM.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Decision Below Conflicts With the Second Circuit's Decision in a Case Involving Precisely the Same Facts, and Departs from the Summary Judgment Standards Established by This Court

The Fourth Circuit erred in granting summary judgment to GM. In disregard of the standards established by this Court, the Fourth Circuit failed to consider whether a dispute existed between the parties about genuine issues of material fact. This Court has mandated that, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

A dispute about a material fact is "genuine," if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party ... all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.*, 477 U.S. at 248-49, 106 S.Ct. at 2510,

citing, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). If the evidence is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper. *Morrison v. Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979); *Charbonnages de France v. Smith*, 597 F.2d 406 (4th Cir. 1979).

Any doubt as to the existence of a genuine issue of material fact will be resolved in favor of the party against whom summary judgment is sought. *Celotex Corp. v. Catrett*, 477 U.S. 316, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); *Adickes v. S.H. Kress & Co.*, 70 S.Ct. 1598, 398 U.S. 144, 26 L.Ed.2d 142 (1970); *Phoenix Savings & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245 (4th Cir. 1867). "The burden on the nonmoving party is not a heavy one; it simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10 Wright & Miller, *Federal Practice & Procedure*, §2727 at 148, *citing, First National Bank of Arizona*, 391 U.S. at 289, S.Ct. at 1593. Because the burden is on the movant, the evidence must be construed in the light most favorable to the party opposing the motion, and the party opposing the motion must be given the benefit of all favorable inferences that can be drawn from the evidence. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); *Cole v. Cole*, 632 F.2d 1083, 1090 (4th Cir. 1980).

The Fourth Circuit did not cite *Anderson*, *Celotex*, or any other case relating to summary judgment principles. If the Fourth Circuit had applied these principles, it would have concluded at a minimum that, as GM argued below and on appeal, there was a dispute of fact precluding summary judgment on the critical liability question: whether Central possessed a separate franchise for heavy duty trucks. When the Fourth Circuit granted summary judgment to GM, it necessarily reviewed facts disputed by GM, which the District Court resolved in Central's

favor, and it necessarily resolved those same facts in favor of GM. In its own prior decision, *Johnson v. Orweat Foods Co.*, 785 F.2d 503, 511 (4th Cir. 1986), the Fourth Circuit held that, under a Connecticut statute very similar to Maryland's, "the existence of a franchise relationship ... appears to require a complex factual inquiry." Likewise, in *Cassidy Podell, Lynch, Inc. v. Snydergeneral Corp.*, 994 F.2d 1131, 1137-38 (3rd Cir. 1991), the Third Circuit recently held that whether a relationship constitutes a franchise "presents a mixed question of fact and law ... requir[ing] an examination not only of the language of the [Dealer] Agreement, but also the parties' practices under it." And, perhaps most importantly, in *Arthur Glick Truck Sales v. General Motors Corporation*, 865 F.2d 494 (2d Cir 1989), a case involving the same Dealer Sales and Service Agreement and the same heavy-duty truck Addendum at issue in this case, the United States Court of Appeals for the Second Circuit reached a conclusion diametrically opposite the one reached by the Fourth Circuit in this case, and held that the critical liability question could not be factually resolved on a motion for summary judgment.

The Fourth Circuit reversed the District Court's judgment on the critical liability issue. The Fourth Circuit found that the Addendum to the Dealer Sales and Service Agreement, which granted Central the right to sell GM heavy duty trucks, did not constitute a separate franchise under Maryland law. The Dealer Sales and Service Agreement gives Central the right to identify itself as an authorized GM dealer, and to purchase, sell and service goods manufactured by GM. The Agreement provides that the goods which Central is authorized to purchase, sell and service are limited to those "identified in the Motor Vehicle *Addendum*" (not "Addenda") attached to the Agreement. One Addendum authorized Central to purchase, sell and service heavy duty truck products. Without that Addendum, Central

was not authorized to sell GM heavy duty truck products.[3] The existence of a franchise agreement authorizing Central to purchase, sell and service GM heavy duty truck products was, therefore, dependent upon the combination of both the Agreement and an "*Addendum.*" The cancellation of either terminated Central's heavy duty truck franchise.

Under Maryland law, a vehicle franchise is:

> A written arrangement, whether or not for a definite period, in which a manufacturer, distributor, or factory branch, grant to a dealer or distributor a license or right to use a trade name, trademark, service mark, or related characteristic in the sale, leasing or servicing of new vehicles.

Md. Transp. Code Ann. §11-125. To establish a "franchise" requires a "written arrangement" which: (1) grants "a license or right to use a trade name;" and (2) permits the use of that right "in the sale, leasing or servicing of new vehicles." In this case, the Agreement supplied the first element, and the Addendum supplied the second. Without the Addendum, the rights granted in the Agreement were illusory.

The District Court relied on *Bethesda Ford, Inc. v. Ford Motor Co.*, 572 F.Supp. 623, 630 (D. Md. 1983), in which it was held that the term "franchise," as employed in Md. Transp. Code Ann. §15-209, should be broadly construed to "encompass all oral or written understandings between the franchisor and the franchisee, limited only by the possible application of the Statute of Frauds or parole evidence rule." In *Bethesda Ford*, the Court rejected an argument that the "franchise" only included the

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[3] Separate Addenda were required in order for Central to be authorized to sell light or medium duty GM trucks. Under the express language of the Agreement however, the Agreement plus an "Addendum" (singular) constitutes a franchise. If Central had possessed only the one heavy duty Addendum, it would be indisputable that its cancellation resulted in a franchise termination.

original (Ford, in that case) Sales and Service Agreement. The Court found "no basis" in the legislative history "for such a restrictive definition of the term "franchise."[4] A "broad interpretation of the term," the Court held, "would provide automobile dealers with a safeguard against the contracts of adhesion which predominate in the franchise area and would further the protective purpose which appears to lie behind §15-209." *Id.*

In ruling that Central's heavy duty truck business was a separate and distinct "franchise," the District Court also relied upon a substantial amount of evidence showing that both parties treated the heavy duty business as separate and distinct from the medium and light duty businesses, and that the heavy duty Addendum is a separate franchise that was negotiated and agreed upon as such by the parties. The Fourth Circuit ignored these facts. After reviewing the facts, the District Court concluded that the heavy duty Addendum constituted a separate franchise. The Fourth Circuit's review of the facts produced the opposite conclusion. At the very least, the Fourth Circuit's disagreement with the District Court's fact findings demonstrate the existence of genuine issues of material fact which should have been resolved at trial, and not by the Appellate Court. *See, Arthur Glick Truck Sales*, 865 F.2d at 497.

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[4] In 1972, the Maryland Legislature enacted a complex regulatory scheme. *See* 1972 Md. Laws, ch. 544. Finding and declaring that distribution of motor vehicles "vitally affects the general economy of the State and the public interest and the public welfare," the General Assembly enacted the Franchise Termination Act in order "to regulate ... manufacturers engaged in the sale or distribution of [motor] vehicles in the state of Maryland, in order to foster vigorous and healthy competition, to prevent the creation or perpetuation of monopolies, and to promote the public safety and welfare...." 1972 Md. Laws., ch. 544. In sum, the Act was designed to enable dealers, who are rather weak economic units, to bargain on more equal terms with manufacturers, who possess relatively more muscle in the market place.

The District Court found that, as of September 30, 1987, GM had appointed 2,427 truck dealers nationwide. Approximately 10%, (only 282 dealers) were heavy duty truck dealers. Of that number, some 30% (85 dealers) were franchised only to sell heavy duty trucks. The remaining 197 dealers were franchised as "full-line dealers," authorized by separate Addenda to sell heavy, medium and light duty trucks. Central was one of the "full line dealers." If Central had been in the group of dealers which possessed only one franchise, to sell heavy duty trucks, there would be no question that the heavy duty Addendum constituted a separate franchise. The District Court found this distinction a meaningless fortuity, while the Fourth Circuit found it controlling. *Compare, Arthur Glick Truck Sales*, 865 F.2d at 497.

The District Court also found that GM gave Central rights as a dealer in a separate and different geographic "area of responsibility," for each of the three Addenda. GM evaluated Central's performance as a heavy duty dealer solely in the area of primary responsibility allocated to Central's heavy duty business. The District Court gave considerable weight to the fact that different geographic regions were assigned to Central for heavy, medium and light duty trucks. (App. at 55). The Fourth Circuit was "unpersuaded," declaring, without explanation, "[d]esignating different regions for different products creates no separate franchises in each product when Central is the selling agent for them all." (App., at 9).[5] *Compare, Arthur Glick Truck Sales*, 865 F.2d at 497.

The District Court also based its ruling on the testimony of Elmo Sergo, the Director of International Strategy for GM's Truck and Bus Group and the GM officer principally responsible

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[5] Under the Fourth Circuit's logic, if Central's geographic area for medium duty trucks was in Alaska, and its area for light duty trucks was in Texas, Central still would have had only one franchise, because it is "the seller for them all" and, in the Fourth Circuit's view, had only "one written arrangement."

for negotiation of the Volvo GM joint venture, before the Pennsylvania Motor Vehicle Board in a case involving another dealer whose heavy duty franchise was terminated in 1987.[6] The District Court characterized Mr. Sergo's testimony as an "admission against interest."

Mr. Sergo testified "that there are actually at least three [truck] industries, not only one. Three in the sense that there is an industry for light, medium and heavy, and naturally buses." Mr. Sergo explained that the heavy, medium and light duty truck businesses were "separate businesses," comprising "three distinct markets." He stated that, unlike the other businesses, the "heavy duty business is not to sell the truck. Heavy duty business is to keep the truck on the road. It's service business. The emphasis is clearly on service, parts availability."

Mr. Sergo also testified that when GM appointed heavy duty truck dealers, it looked for different attributes than in light and medium duty dealers. In particular, GM sought highly trained salesmen, whom Mr. Sergo called "truck engineers," and whom GM preferred to not involve in selling medium or light duty trucks. He testified that the type of facilities needed by a heavy duty truck dealer also were different than those required by medium or light duty dealers, requiring special tools and specially trained mechanics. Mr. Sergo also stated that the marketing of heavy duty trucks was different because the focus was on building up relationships over time, rather than merely by advertising. He agreed that if GM were to "take away [a] dealer's heavy duty truck Addendum, in effect, [GM] was cutting off whatever segment or aspect of that business he has been able to develop...."

After reviewing the evidence that GM itself looked at the "heavy duty truck addendum ... as a distinct franchise rather than as an additional product line," including Mr. Sergo's "admis-

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[6] Mr. Sergo later testified to the same effect at the June 1990 valuation trial. (App., at 20).

sions against interest," the District Court held that when GM canceled the heavy duty Addendum, "with all product lines within it being withdrawn from the dealer ... there is a termination of a franchise within the meaning of Section 15-209 of Maryland's Transportation Article." (App. at 55). The Fourth Circuit refused to consider this evidence, because it did not want to "require detailed studies measuring product differentiation as well as inquiries into a manufacturer's varying strategies for designing, distributing and marketing different product lines," and because it did not want to examine "the relative importance of each product to the franchisee and/or manufacturer." (App. at 9).

The Fourth Circuit held that the heavy duty Addendum, which was one of several Addenda to the Agreement, did not grant Central a separate franchise. It held that Central had only one GM franchise encompassing heavy, medium and light duty lines of trucks, and that Central's franchise was not terminated when GM canceled the heavy duty Addendum because the medium and light duty Addenda remained in effect permitting Central to continue selling GM trucks. Without considering the summary judgment standards established by this Court, the Fourth Circuit granted judgment to GM. At a minimum, however, and as GM had contended before both the Court of Appeals and the District Court, the Fourth Circuit was required by the prior decisions of this Court to find that genuine issues of material fact remained to be resolved at trial. *Compare, Arthur Glick Truck Sales*, 865 F.2d at 497.

In granting GM judgment, the Fourth Circuit looked exclusively to the form of the written arrangement between the parties, created solely by GM. The Court stated:

> The Maryland statute defines franchise not in terms of whether product lines occupy a distinct niche or are geared to different markets, but rather in terms of written arrangements and the license and right to use

> a trade name. To adopt Central's proposed approach is not only contrary to the statutory directive, but it would also introduce substantial uncertainty into business relationships. To determine whether a franchise existed, parties could no longer look simply to the written arrangement governing their relationship.

(App. at 9). Ostensibly, if GM and Central had entered into three separate Dealer Sales and Service Agreements, each granting Central the right to sell a different class of trucks, the Court would have found that Central had three separate franchises for heavy, medium and light duty trucks. However, because GM created the agreement as a single document containing multiple Addenda, the Court concluded that, "the Addenda are not separate arrangements between the parties, but rather constituent parts of the whole Truck Dealer Agreement." (App. at 8).

The Fourth Circuit's decision in this case is in direct conflict with the decision of the Second Circuit in *Arthur Glick Truck Sales v. General Motors Corporation*, 865 F.2d 494 (2nd Cir. 1989).[7] By awarding GM judgment, despite the existence of genuine issues of material fact, the Fourth Circuit's decision grossly departs from the principles established by this Court for summary judgment determinations under Rule 56 of the Federal Rules of Civil Procedure.

In *Arthur Glick Truck Sales*, the Second Circuit, construing a very similar New York statute defining the term "franchise," reversed a District Court award of summary judgment to GM under precisely the same facts. The Court of Appeals chastened

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[7] The Fourth Circuit's decision also conflicts with a prior decision by that Court, holding that the determination of whether a franchise exists is a complex factual inquiry precluding resolution at the summary judgment stage. It also conflicts with a decision of the Third Circuit to like effect. *Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986); *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131 (3rd Cir. 1991).

the lower court for applying a superficial analysis closely resembling that employed by the Fourth Circuit in this case. The Second Circuit stated:

> The district court decided that no franchise had been terminated. Its analysis was purely economic, saying that the statute does not require franchisors to continue to manufacturer products that are no longer profitable and that to apply the New York statute to a corporation's decision to cease production of a particular line in order to cut losses would have a perverse economic result and would be a roadblock to the natural flow of commerce, preventing businesses from running in an economically efficient fashion. There was no analysis of the attributes of a franchise under New York's Franchise Motor Vehicle Dealer Act and of whether heavy-duty trucks might constitute a separate franchise. Nor did the court take note of the fact that General Motors continues to manufacture the Brigadier truck and distribute it through a new network of dealers established by the joint venture.

Id., 865 F.2d at 497.

The Second Circuit next proceeded to consider facts nearly identical to those relied upon by the District Court in this case.

> Heavy duty trucks are a significant segment of the market, calling for a separate Addendum to the Dealer Sales and Service Agreement. The heavy-duty truck Addendum itself says that it shall remain in effect "unless canceled or until superseded by a new Motor Vehicle Addendum furnished Dealer by GMC Truck." Surely as to those eighty-five or so dealers who had only the heavy-duty truck line, that is a franchise. Should it be different for the dealers like Glick who carried the full line? It is significant, too,

> that Glick's territory for the sale of heavy-duty trucks differed from its territory for other trucks.
>
> Where a dealer has made an investment in parts and training service employees and where the line of trucks is functionally related to a distinct segment of the market, as heavy-duty trucks appear to be, and where their sale constitutes a substantial part of the dealer's revenues, it may be that the dealer has been given a "franchise."

Id. The Court concluded that the dealer "is entitled to discovery and trial to determine whether the heavy-duty truck line was a separate franchise." *Id.*

The Second Circuit's holding in *Arthur Glick Truck Sales* is consistent with the decisions rendered by virtually every trial court to consider this issue. *See C-B Kenworth, Inc. v. General Motors Corp.*, 706 F.Supp. 952, 955 (D. Me. 1988) (whether heavy duty Addendum is a separate franchise "presents a factual issue that the Court cannot resolve" on summary judgment); *General Motors Corp. v. Gallo GMC Truck Sales*, 711 F.Supp. 810, 815 (D.N.J. 1989) (heavy duty truck franchise requires "coexistence of *both* a dealer agreement *and* a valid Motor Vehicle Addendum"); *In re General Motors Corp. and Volvo White Truck Corp.*, No. 8760 0812 (Dec. 17, 1987), (finding by Pennsylvania Board of Vehicle Manufacturers, Dealers and Salespersons that GM's argument "places the form of the dealer agreement over its substance, particularly as the form of a dealer agreement is controlled by the manufacturer"); *General Sales, Inc. v. General Motors Corp.*, Civ. No. 87-1297 (M.D. Pa. 1987) (issue of whether "the heavy duty addendum constituted a separate franchise agreement ... presents questions of fact that cannot be resolved" on summary judgment); *C. Earl Brown, Inc.*

v. Commonwealth of Pennsylvania, 555 A.2d 314, 315 (Pa. Comwlth Ct. 1989) (same).[8]

Not only did the Fourth Circuit fail to weigh facts that the Second Circuit and a number of trial courts found material and highly probative, the one fact upon which the Fourth Circuit appears to have relied, that the Addenda "were frequently changed when model offerings varied," (App. at 8), is disputed by Central. Although *products*, not entire product lines, were discontinued under the Agreement between GM and Central, such true product discontinuances were always accompanied by the introduction of newer, equivalent, replacement products (such as those trucks that were manufactured after 1987 by the Volvo GM Joint Venture). There was a basic understanding between the parties that there always would be some group of heavy duty truck products being marketed by GM and made available for sale by Central.

Had the Fourth Circuit properly applied the principles laid down by this Court governing summary judgment, as the Second Circuit did in *Arthur Glick Truck Sales*, it would have remanded the case to the District Court for resolution of the factual issues, the existence of which the Fourth Circuit, by its different decision, clearly recognized. To resolve the conflict between the Fourth and Second Circuits, this Court should issue a Writ

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[8] In the Court of Appeals, GM principally relied upon an unpublished Seventh Circuit Decision, *Mid-State Truck Services, Inc. v. General Motors Corp.*, Nos. 88-1684, 88-1792, 88-2017, 88-2052 and 88-2722 (7th Cir. 1990), which the Fourth Circuit properly ignored in its opinion. In *Mid-State*, the Court expressly distinguished *Arthur Glick Truck Sales* on the basis that in that case "the canceled heavy duty lines constituted a 'substantial portion of the dealer's revenues,'" while "in Mid-State's case the canceled GM lines accounted for less than 6.5% of the ... dealer's revenues." The Seventh Circuit further stated that its conclusions in *Mid-State* were controlled by a Wisconsin administrative board's prior interpretation of "franchise," in a case known as *Bett v. America Motors Corp.*, No. H-317 (Wis. Comm. Transp. April 3, 1985).

of Certiorari and reconsider the issues of importance presented by this case.

II. The Issues in This Case Implicate Important Public Interests Affecting the Competitive Balance Between Franchisors and Franchisees

At issue in this case is whether franchisees, who are in no position to bargain with their franchisors, will be forced to bear the costs of purely self-motivated business decisions of franchisors, and whether the States can enact laws requiring that the franchisors bear the cost of market restructurings initiated by them to promote their own interests.[9] The Maryland General Assembly enacted Md. Transp. Code Ann. § 15-209 to shift the cost of such business decisions to the franchisors who would profit as a result of the decisions. The Fourth Circuit, by construing the term "franchise" in an extremely limited and narrow fashion,[10] has, in essence, handed franchisors a facile means of circumventing Maryland's Franchise Termination Act and similar laws enacted by other State legislatures.

As a result of the Fourth Circuit's opinion in this case, franchisors now can craft their franchise agreements in a manner that will provide them with almost unlimited discretion to cease supplying products to franchisees. If the franchise agreement is cleverly drafted, so long as a franchisor supplies one product to a franchisee, the franchisor cannot be held to have terminated the franchise.

The Fourth Circuit's ruling most directly impacts upon the thousands of GM dealers with multiple Addenda, including those dealers currently litigating the cancellation of their GM

[9] Recognizing the public importance of the issues presented by this case, the National Automobile Dealers Association and the Motor Vehicle Manufacturers Association both filed Amicus Curiae briefs with the Fourth Circuit.

[10] *See Bethesda Ford*, *supra*, requiring that the term "franchise" be broadly construed, under Maryland law, in order to further the dealer-protective purposes of the Act.

heavy duty truck Addendum. However, the decision in this case also provides a precedent that is antagonistic to all franchisees nationwide. Particularly in light of the Fourth Circuit's remark that the Maryland statute may violate the Commerce Clause of the United States Constitution if construed to shift the cost of product withdrawal to franchisors, the opinion alarmingly impacts upon the rights of every person in the United States who has substantially invested in a franchise.[11]

It is well settled that the purpose of state and federal dealer franchise protection laws is to equalize the vast disparity in bargaining strength enjoyed by manufacturers in the franchise relationship, and that such laws are permissible and serve the public interest. *New Motor Vehicle Bd. of California v. Orrin W. Fox*, 439 U.S. 96 (1978); *American Motor Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219 (4th Cir. 1979). The Maryland General Assembly, in enacting the Franchise Termination Act, meant to provide dealers like Central with a measure of protection against the type of actions taken by GM in this case. The Fourth Circuit's opinion in this case now has eviscerated the Act and rendered it impotent. If the ruling in this case is permitted to stand, the legislatures of those states in this Circuit will be powerless to prevent manufacturers from imposing the costs of their business decisions upon their dealers.

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[11] The Maryland statute, and others like it, do not prohibit franchisors from taking any action whatsoever. While the statute does make some strategic alternatives less economically attractive, the Commerce Clause does not protect a manufacturer's right to maximize its profits. *See Kealey Pharmacy v. Walgreen Co.*, 761 F.2d 345, 351 (7th Cir. 1985) (no violation of Commerce Clause because of manufacturer's "ready ability to pay" terminated dealers); *Carlos v. Phillips Business Systems, Inc.*, 556 F.2d 170, 173 (1st Cir. 1989). Moreover, this Court previously has recognized that the Commerce Clause does not "protect the particular structure or methods of operation in a retail market." *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978); *See also American Motor Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219, 223 (4th Cir. 1979); *Solman Distributors, Inc. v. Brown-Forman Corp.*, 888 F.2d 170, 173 (1st Cir. 1989).

Conclusion

For the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted

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Central GMC, Inc.

No. 90-2712

United States Court of Appeals

For The Fourth Circuit

Central GMC, Incorporated,
Plaintiff-Appellee,

v.

General Motors Corporation,
Defendant-Appellant,

Motor Vehicle Manufacturers Association Of The United States, Inc.; Association Of International Automobile Manufacturers, Incorporated; National Automobile Dealers Association,
Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Norman P. Ramsey, District Judge.
(CA-88-263-R)

Argued: June 5, 1991
Decided: October 7, 1991

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and WILKINSON and WILKINS, Circuit Judges.

Reversed by published opinion. Judge Wilkinson wrote the opinion, in which Justice Powell and Judge Wilkins concurred.

COUNSEL

ARGUED: Daniel Lee Goldberg, BINGHAM, DANA & GOULD, Boston, Massachusetts, for Appellant. Daniel Christopher Ohly, HAZEL & THOMAS, P.C., Baltimore, Maryland, for Appellee. ON BRIEF: William N. Berkowitz, BINGHAM, DANA & GOULD, Boston Massachusetts; Joseph G. Finnerty, Jr., PIPER & MARBURY, Baltimore, Maryland; Carol H. Lesnek-Cooper, GENERAL MOTORS CORPORATION, Detroit, Michigan, for Appellant. Arnold M. Weiner, Bruce L. Mann, HAZEL & THOMAS, P.C., Baltimore, Maryland; Ronald D. West, WEST & FEINBERG, P.C., Bethesda, Maryland, for Appellee. William T. Lehner, Richmond, Virginia; James A. Moors, John P. Kitzmiller, NATIONAL AUTOMOBILE DEALERS ASSOCIATION, McLean, Virginia, for Amicus Curiae National Automobile Dealers Association. William H. Crabtree, Edward P. Good, MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., Detroit, Michigan; Charles H. Lockwood, II, John T. Whatley, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., Arlington, Virginia; Stephen M. Shapiro, Kenneth S. Geller, MAYER, BROWN & PLATT, Washington, D.C. for Amici Curiae Motor Vehicle Manufacturers Association of the United States, Inc. and Association of International Automobile Manufacturers, Inc.

OPINION

WILKINSON, Circuit Judge:

The question in this case is whether a truck dealer has separate franchises for purposes of state law in the different lines of vehicles it is authorized to sell. The question of how a franchise should be defined grows out of General Motors Corporation's (GMC) decision to discontinue manufacturing heavy duty trucks. Numerous GMC Truck dealers across the

nation have challenged the impact of this decision on their businesses. Here, Central GMC, a Maryland dealership authorized to sell light, medium, and heavy duty trucks, contends that it had a separate franchise in heavy duty trucks that was impermissibly terminated. The district court agreed and awarded Central over $2 million in damages.

We reverse. Under the Maryland statute at issue, Central had one franchise encompassing all three lines of trucks. Central's franchise therefore was not terminated when GM discontinued a line of trucks that comprised only part of that franchise. The Maryland statutory scheme governing the franchise relationship was not intended to deter manufacturers from making adjustments in their product mixes dictated by economic circumstances. Indeed, to hold this discontinuance of an unprofitable product a franchise termination would risk sanctioning an impermissible state restraint upon interstate commerce.

I.

Central GMC is a truck dealer in Landover, Maryland which sells several brands of trucks including General Motors, Mercedes, and Kenworth. In 1985, Central GMC and General Motors Corporation entered into a GMC Truck Dealer Sales and Service Agreement. Under this agreement, Central had the right to service GMC trucks and to identify itself as an authorized GMC Truck dealer. Central also had a "non-exclusive right to buy the new GMC Truck motor vehicles identified in the Motor Vehicle Addend[a]" appended to the truck Dealer Agreement. Four such addenda were attached, and they listed the various models of GMC trucks available for purchase. Two of the addenda pertained to medium duty trucks, one addendum pertained to light duty trucks, and the fourth addendum related to heavy duty trucks. The heavy duty truck addendum itself listed four models of trucks available for sale. That addendum also provided that it "shall remain in effect unless canceled or until

superseded by a new Motor Vehicle Addendum." The Truck Dealer Agreement stated that "General Motors may discontinue any line of Product" and that GM would not be liable for a delay in delivering products that was caused by "any discontinuance of manufacture or sale."

In 1986, GMC decided to discontinue manufacturing heavy duty trucks. Since the late 1970s, GMC had suffered substantial losses from the production of heavy duty trucks, and its share of that market had apparently become the smallest of the seven major industry competitors within the United States. In fact, from 1981 to 1985 GMC's share of the heavy duty truck market had declined by almost half. Faced with the prospect of sinking a substantial amount of capital into its heavy duty truck operation in order to return it to a competitive position, GMC chose instead to reduce its losses by withdrawing from the heavy duty truck market. Rather than liquidate its American heavy truck operations as it had done with its European operations, GMC in 1986 agreed to transfer assets used in its American operations to a new corporation formed with AB Volvo, a Swedish motor vehicle manufacturer, and two of Volvo's subsidiaries (Volvo).

In this enterprise, known as Volvo GM Heavy Truck Corporation, GMC was to occupy a limited role. Volvo owned a substantial majority of stock in the corporation, controlled the board of directors, designated the venture's officers, and ran its day-to-day operations. By December of 1987, with one exception, GMC had discontinued the manufacturing and marketing of heavy duty trucks.

In the fall of 1986, GMC began informing its truck dealers about the details of the new enterprise. In September, GMC announced to its dealers including Central that it had reached a tentative agreement with Volvo and that "it is anticipated that not every GMC Truck dealer will be selected to be a part of the new joint venture." In December 1986, GMC notified its dealers

that it would discontinue offering heavy duty trucks for sale on December 31, 1987 and that the heavy duty truck addendum would expire on that date. The December letter further stated that "the remaining motor vehicle addenda and the General Motors Corporation Dealer Sales and Service Agreement will not be affected."

The Volvo GM corporation selected new dealers for its heavy duty trucks generally from among the existing Volvo and GMC dealers. The selection of dealers for the new corporation was conducted by a committee comprised of three GMC representatives and three Volvo representatives. Because a sales territory often contained both Volvo and GMC dealers, the committee frequently had to choose among dealers. Central was not selected to be one of the new enterprise's dealers. Consequently, when Central's heavy duty truck addendum expired on December 31, 1987, new GMC heavy duty trucks would no longer be available for sale nor would Central sell trucks manufactured by the new corporation. Central retained, however, the right to sell and service GMC light and medium duty trucks. Central also executed an agreement in January 1988 enabling it to continue servicing GMC heavy duty trucks as well as to work on Volvo GM trucks.

On December 30, 1987, Central brought an action against GMC alleging that Central had a franchise in heavy duty trucks and that this franchise would be wrongfully terminated under section 15-209 of the Maryland Transportation Code if GMC canceled the heavy duty truck addendum.[1] The action was

[1] Section 15-209 is part of a statutory scheme designed to regulate the relationship between motor vehicle manufacturers and their dealers. Section 15-209(a) provides that "[a] manufacturer may not terminate ... the franchise of a dealer, notwithstanding any term or provision of the franchise, unless: (1) The dealer has failed to comply substantially with the reasonable requirements of the franchise." Section 15-209(e)(2) states that "[i]f the dealer requests a hearing under this subsection, the dealer's franchise continues in effect, notwithstanding any term or provision of the franchise or any other provision of this subtitle, until the [Motor Vehicle} Administration, after the

originally brought before the Maryland Motor Vehicle Administration but was removed by GMC to federal district court. The court, on summary judgment, rejected GMC's principal argument that Central had one franchise in all GMC trucks, not a separate franchise in heavy duty trucks, and that GMC had simply exercised its right to withdraw from the heavy duty truck market. Finding GM liable for a wrongful franchise termination, the district court then determined the damages caused by the termination. The court rejected GM's argument that it had a Seventh Amendment right to a jury trial on the issue of damages. Following a bench trial, the court awarded Central $1,850,701 as the value of its franchise and $277,605 in prejudgment interest.

GMC now appeals.

II.

The critical issue in this appeal is whether Central's interest in the sale of heavy duty trucks constitutes a franchise under Maryland law. Central contends that it has a separate franchise in heavy duty trucks corresponding to the addendum to the Truck Dealer Agreement. Central argues that is position is bolstered by the fact that heavy duty trucks occupy a district niche in the truck sales market. GMC responds that Central has only one GMC franchise that encompasses the sale of light, medium, and heavy duty trucks. In GMC's view, when it withdrew from the market for heavy duty trucks, Central's franchise remained intact as it continued to sell light and medium duty trucks. We think GMC's position more closely conforms to the statutory definition of franchise and more clearly respects the distinction between discontinuing a product line and terminating an entire franchise.

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hearing, makes a final determination." Section 15-209(f)(1) provides that "[i]n addition to any administrative and criminal sanctions imposed under this subtitle, a manufacturer ... that terminates, cancels, or fails to renew the franchise of a dealer in violation of this section shall pay to the dealer the fair value of his business as a going concern."

The starting point for our analysis is naturally the language of the Maryland statute. *See Dole v. United Steelworkers of America,* 110 S.Ct. 929, 934 (1990). Section 11-125 of the Maryland Transportation Code defines franchise as:

> a written arrangement, whether or not for a definite period, in which a manufacturer, distributor, or factory branch grants to a dealer or distributor a license or right to use a trade name, trademark, service mark, or related characteristic in the sale, leasing, or servicing of new vehicles.

One written arrangement, the GMC Dealer Sales and Service Agreement, governs the relationship between GMC and Central. This agreement provides Central with the right to use the GMC trademark. All the trucks distributed to Central under the Agreement were sold under a single trade name, "GMC Truck." The Agreement also gave Central the right to identify itself as "an authorized GMC Truck dealer." Plainly this evidence indicates that Central has one statutory franchise in GMC trucks and that the sale of heavy duty trucks was simply one part of that franchise. Even Central at times appears to recognize the efficacy of this approach to defining its franchise. At one point in its administrative complaint, for example, Central speaks of holding "a franchise to sell GMC trucks." Later in the complaint, Central terms heavy duty trucks a "component" of its GMC franchise. Furthermore, both before and after the heavy duty truck models were discontinued, Central identified itself as a GMC Truck dealer.

Central contends, however, that without an addendum to the agreement specifying which trucks it may purchase, it cannot really use GMC's trade name or any of the other rights granted in the agreement. Thus, says Central, a franchise comes into existence only when the dealer agreements is combined with an addendum. Because different addenda exist for each of the three lines of trucks, Central reasons that it has three separate

franchises including one for heavy duty trucks. According to Central, its position finds support in the broad interpretation given to the term franchise under Maryland law. *See Bethesda Ford, Inc. v. Ford Motor Co.,* 572 F. Supp. 623 (D. Md. 1983).

In our view, the addenda are not separate arrangements between the parties, but rather constituent parts of the whole Truck Dealer Agreement. *See Lippo v. Mobile Oil Corp.,* 776 F.2d 706, 713 n.13 (7th Cir. 1985) (franchise agreement consisting of five separate documents executed at the same time is to be read as a whole). "[W]hen interpreting any contract provision, the agreement must be considered as a whole." *NSC Contractors, Inc. v. Borders,* 564 A.2d 408, 412 (Md. 1989). *Bethesda Ford,* a case relied upon by Central, is not inconsistent with the basic approach to contract interpretation. In that case, the court concluded only that agreements or understandings outside the original Sales and Service Agreement on the leasing of a dealer's facilities could be considered part of its franchise. 572 F. Supp. at 630. *Bethesda Ford* did not involve the issue of whether a product line constitutes a franchise nor did the case sanction dividing a dealership into separate franchises corresponding to the addenda attached to its main Dealer Agreement. Interpreting the Dealer Agreement as a whole avoids a basic inconsistency in Central's position. Central contends that it has three franchises corresponding to the three lines of trucks it sold, but to follow Central's own logic it would have four separate franchises corresponding to the four addenda. Although two of the four addenda pertain to medium duty trucks, not even Central suggests that it has two separate medium duty truck franchises.

Central simply exaggerates the legal significance of the addenda. The addenda merely listed which trucks were available for purchase. They were subsidiary, i.e., *addenda*, to the main contract and were frequently changed when model offerings varied. When GMC canceled the heavy duty truck addendum,

as GMC had reserved its right to do, Central continued to receive other GMC trucks and its rights under the Dealer Agreement remained in effect. In short, Central continued to operate as a GMC Truck dealer well after GMC ceased to make heavy duty trucks.

Central also contends that it has a franchise in heavy duty trucks because GMC treated the sales and services of these trucks differently than it treated light and medium duty trucks. *See Arthur Glick Truck Sales, Inc. v. General Motors Corp.*, 865 F.2d 494 (2d Cir. 1989); *General Motors Corp. v. Gallo GMC Truck Sales, Inc.*, 711 F. Supp. 810 (D.N.J. 1989). For example, Central notes that GMC assigned it a different area of geographic responsibility for heavy duty trucks than it did for the other two truck lines. We are unpersuaded, however. The different assignments not surprisingly stemmed from variations in demand for various truck models over geographic regions. Designating different regions for different products creates no separate franchises in each product when Central is the selling agent for them all.

The Maryland statute defines franchise not in terms of whether product lines occupy a distinct niche or are geared to different markets, but rather in terms of written arrangements and the license and right to use a trade name. To adopt Central's proposed approach is not only contrary to the statutory directive but it would also introduce substantial uncertainty into business relationships. To determine whether a franchise existed, parties could no longer look simply to the written arrangement governing their relationship. Instead, the question of franchise existence would require detailed studies measuring product differentiation as well as inquiries into a manufactuer's varying strategies for designing, distributing, and marketing different product lines. The relative importance of each product to the franchisee and/or manufacturer would also have to be examined. A more litigious approach to the law of franchise termination

would be difficult to devise — a difficulty which from Central's viewpoint might be avoided only by holding flatly that a dealer has a separate franchise in every product that it sells. The language of the Maryland statute avoids these problems and leads us to the conclusion that GMC has discontinued a product but has not terminated a franchise. *See* Md. Transp. Code Ann. § 11-125 (Supp. 1990).

III.

Central attempts to shift the focus, however, from the language of the statute to its asserted purpose. According to Central, any reading of the statute must be informed by its overarching purpose of protecting vehicle dealers from the superior bargaining power possessed by vehicle manufacturers. To give effect to these protections, Central contends that GMC's withdrawal of the heavy duty truck line should be treated as a franchise termination. We disagree for three reasons: (1) general purposes are a less reliable guide to statutory interpretation than the specific language chosen by the legislative branch to implement those purposes; (2) the general purpose of protecting dealers against abuses of superior bargaining power was not intended to insulate them from every adverse turn in a market economy; and (3) a reading of the Maryland statute equating the discontinuance of a product line with impermissibly terminating a franchise would raise significant commerce clause concerns. As we have addressed the specific statutory language in the preceding section, we now turn to our second and third points of response to Central's position in this case.

A.

Two primary purposes animate Maryland's vehicle franchise act:[2] preventing "frauds, discrimination and other

[2] The statute also lists two additional purposes: "to prevent the creation or perpetuation of monopolies and to promote the public safety and welfare." 1972 Md. Laws, ch. 544 at 1505. We think these purposes are largely derivative of those enumerated in the text of this opinion.

abuses" in the manufacturer/dealer relationship and fostering "vigorous and healthy competition" in the motor vehicle industry. *See* 1972 Md. Laws, ch. 544 at 1505. Neither of these purposes would be served by interpreting GMC's actions as an impermissible franchise termination.

Central is certainly correct that the statute's focus on preventing frauds and other abuses was intended to prevent overbearing behavior by franchisors which often possess greater bargaining power than do their franchisees. *See Bethesda Ford*, 572 F. Supp. at 630. In this case, however, GMC did not exploit any disparities in bargaining power vis-a-vis Central. It simply withdrew from the heavy duty truck market in a non-discriminatory fashion by canceling all pre-existing heavy duty truck addenda. GMC took these actions in a good faith effort to stem the rising tide of losses associated with its presence in the heavy duty truck market. We do not believe that economic restructuring of this sort is a form of abuse proscribed by the dealer protection statute; rather it is a legitimate response to changed market conditions. *See Jimenez v. Country Pride Foods, Ltd.*, 858 F.2d 817, 823 (1st Cir. 1988) (reporting opinion of the Supreme Court of Puerto Rico on a certified question); *American Mart Corp. v. Joseph E. Seagram & Sons, Inc.*, 824 F.2d 733, 734 (9th Cir. 1987).

There are, to be sure, many contentions in this case revolving around the question of whether GMC's decision to participate in the joint venture constituted an illegal abuse of its power. Central argues that GMC's continued manufacture of its Brigidier model heavy duty truck for a year after the addendum was canceled evidences a continued participation in the market. GMC responds by noting that while it is true that GMC continued to manufacture the Brigadier for one year, GMC did so as a subcontractor for the joint venture and sold Brigadiers only to the venture. Central points to several other facts which it claims are proof that GMC did not withdraw from the market.

These include the following: the inclusion of "GMC" in the brand name of the joint venture's trucks; provision of GMC truck specifications, tooling, and fixtures to the joint venture; mandatory compatibility of the joint venture's truck engines and transmissions with those produced by a General Motors division; and GMC's right to elect a portion of the joint venture's board of directors. Not surprisingly, GMC argues that other facts prove that it has withdrawn from the market, and these include the following: Volvo owns 76 percent of the stock in the joint venture and controls seven of the ten seats on the board; the joint venture is a separate, independent entity with its own management team, manufacturing facilities, and dealer network; GMC has ceased production, dismantled assembly lines, and discharged personnel in its former heavy duty truck division; Volvo contributed far more assets to the joint venture than GMC; and Volvo controls the day-to-day operations of the joint venture.

We need not delve into this hornets' nest of charges and countercharges because to do so would only obscure the central point of the analysis: the cessation of production of heavy duty trucks was a legitimate, lawful reaction by GMC to unfavorable market conditions. Once the decision to cease production of heavy duty trucks had been made, GMC faced the choice of complete liquidation of the division or investment of salvageable heavy duty truck assets in a joint venture. GMC opted for the latter course, and we do not believe this to be legally infirm. We again emphasize that it is not the fact that GMC's market response took the form of a joint venture that is controlling so much as the fact that the venture itself represented a legitimate response on the part of GMC to a pronounced decline in the market position of its product. Such a legitimate, nondiscriminatory response to changing commercial realities does not constitute an abuse of superior bargaining power and hence does not run afoul of the purpose of the Maryland statute.

A second purpose of the statutory scheme, fostering "vigorous and healthy competition" in the motor vehicle industry, *see* 1972 Md. Laws, ch. 544 at 1505, would also be disserved if GMC's actions were deemed a franchise termination. Indeed, Central's proposed approach to franchise termination would guarantee franchisees protection from any downturn in the market while denying franchisors the ability to react to that same market by compelling them to pay a substantial penalty to dealers for discontinuing any unprofitable product line. The stated purpose of the Maryland statute, however, is not the narrow one of boundless state protectionism. We cannot read into that purpose an intent on the part of the Maryland legislature to make franchise ownership a virtually risk free endeavor at the cost of eviscerating an entire industry's ability to respond to changing market conditions. *See Jimenez v. BP Oil, Inc.*, 853 F.2d at 272-73; *Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 388 (4th Cir. 1986); *Carolina Truck & Body Co. v. General Motors Corp.*, 402 S.E. 2d 135, 138 (N.C. App. 1991). These changing conditions in the heavy duty truck market included decreases in demand, deregulation of the trucking industry, increased international competition, and excess manufacturing capacity. *See U.S Dept. of Commerce, The U.S. Automobile Industry, 1985.* Allowing manufacturers to respond to these changes by reinvesting their assets and varying their product mix promotes competition and ultimately benefits consumers, industry employees, and dealers in general. Allowing GMC to discontinue an unprofitable product without the threat of large damage awards thus effectuates an express purpose of the Maryland statute.

B.

Central's approach to the franchise termination issue also raises commerce clause concerns. While the statutory scheme on its face appears to regulate GMC's conduct only in Maryland, "[t]he critical inquiry is whether the practical effect of the

regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Under Central's approach, unless a company pays a significant penalty to its dealers, it must continue to supply a product, even if the product is plainly unprofitable. If, under the statute, GMC must pay dealers a penalty before it can exit the market, the state has effectively imposed on manufacturers a fee for discontinuing operations in Maryland. Such a penalty, which compensates in-state dealers at the expense of out-of-state manufacturers, obviously increases the costs to companies of redeploying their assets throughout the national economy. Indeed, as more and more states imposed inconsistent and uncertain restrictions on product withdrawals, manufacturers would become increasingly reluctant to make hitherto efficient business decisions. The restrictions implicit in the commerce clause are designed to deflect such rigidity in our national economic system and to prohibit states from hindering the "reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

Central nonetheless asserts that damage awards, unlike injunctions, have only an incidental impact on interstate commerce. *See Gallo,* 711 F. Supp. at 819. The Supreme Court, however, has noted that impermissible state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959). Moreover, the threat of substantial damage awards, by making the cost of exiting the market prohibitive, could have the same effect on GMC's operations as if GMC were formally ordered to continue producing unprofitable heavy duty trucks for the Maryland market.

A state may unquestionably act to protect the well-being of businesses within its own borders, but its ability to restrict the capability of national business organizations to respond to

changing economic circumstances is not a question that is free of constitutional difficulty. Consistent with established canons of statutory interpretation, we construe statutes so as to avoid doubts about their constitutionality whenever possible. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.SD. 833, 841 (1986). It is quite possible to interpret section 11-125 of the Maryland Transportation Code in such a fashion. The statute's language and purposes support our holding that Central did not have a separate franchise in heavy duty trucks, and Central therefore is not entitled to compensation from GMC for GMC's nondiscriminatory discontinuation of the heavy duty truck addendum.

IV.

For the foregoing reasons, the judgment of the district court is

REVERSED.

CIVIL ACTION NO. R-88-263

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

CENTRAL GMC, INC.

Plaintiff

v.

GENERAL MOTORS CORPORATION

Defendant

OPINION

For over two decades, Central GMC ("Central") has operated a full service truck dealership in Landover, Maryland. As part of its business during the early-to-mid 1980s, Central sold and serviced General Motors Corporation ("GM") heavy duty trucks. Central was granted the right to do so pursuant to an Addendum to its Dealer Sales and Service Agreement with GM. On December 31, 1987, however, GM canceled Central's heavy duty addendum, thereby terminating Central's GM heavy duty truck franchise.

Central immediately initiated an action challenging the legality of the franchise termination under Maryland Transportation Code § 15-209(a). Md. Transp. Code Ann. § 15-209(a). Asserting diversity of citizenship between itself and Central, GM removed the action – which the statute commits to the Maryland Motor Vehicle Administration – to Federal District Court on January 29, 1988. After denying Central's motion to remand, the Court held a hearing on the parties' cross motions for summary judgment. At that hearing on May 4, 1988, the Court granted summary judgment to Central on its claim that

GM violated § 15-209(a) when GM terminated Central's GM heavy duty truck franchise.

Having found GM liable under § 15-209(a), the only issue remaining to be resolved was the remedy due Central for GM's violation of Maryland law. Pursuant to § 15-209(f), a franchisor that violates § 15-209(a) must pay to the unlawfully terminated franchisee the "fair value of [the franchise] as a going concern." Md. Transp. Code Ann. § 15-209(f).[1] The value of Central's GM heavy duty truck franchise as a going concern as of December 31, 1987, was tried to the Court over seven days.[2] Upon careful consideration of the testimony and documentary evidence presented at trial as well as the final arguments of counsel, the Court is now prepared to rule. This Opinion presents the Court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a). Any findings of fact contained in the conclusions of law, and any conclusions of law contained in the findings of fact, shall be received in their true light.

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[1] In full, Maryland Transportation Code§15-209(f) reads: (f) *Conveyance of dealership on wrongful termination of franchise*:

> (1) In addition to any administrative and criminal sanctions imposed under this subtitle, a manufacturer, distributor, or factory branch that terminates, cancels, or fails to renew the franchise of a dealer in violations of this section shall pay to the dealer the fair value of his business as a going concern.
>
> (2) On payment, the dealer shall convey his business, free of liens and encumbrances, to the manufacturer, distributor, or factory branch.

[2] Central initially demanded that its claim under the Maryland Transportation Code be heard by a jury, but subsequently withdrew its jury demand. GM objected to Central's withdrawal of the jury demand. By Memorandum and Order dated June 1, 1990, the Court concluded that no Seventh Amendment right to trial by jury existed for actions brought under § 15-209. Accordingly, the Court held that the case would be tried to the Court.

I. Background

Before embarking on an analysis of the evidence offered at trial, it would be fruitful, first, to review in more detail the Court's holding that GM is liable under § 15-209[3] and, second, to sketch the basic principles of law governing this trial.

Throughout this litigation, GM has argued that a franchise termination within the meaning of § 15-209 never occurred. Rather, GM asserts that it merely withdrew from the heavy duty truck market through a non-discriminatory product discontinuation brought about by the formation of a joint venture with Volvo. The business formed by the Volvo/GM joint venture, GM contends, entered the heavy-duty truck market while GM exited the market. GM's argument, however, was clearly rejected by the Court in the Opinion issued from the bench on May 4, 1988. The Court held that under § 15-209, the cancellation of the GM heavy duty addendum to Central's Dealer Sales and Service Agreement constituted a termination of the franchise. Moreover, the Court found that GM's withdrawal from the market was neither complete nor nondiscriminatory. In fact, the Court held that "[b]y no stretch of the imagination has GM withdrawn from the heavy truck marketplace." The ruling continued:

> GM's conduct while it has been reorganizing itself within the marketplace demonstrates in the opinion of the Court precisely the type of harm which the statute by the Maryland legislature seeks to address and to prohibit. Upon obtaining franchises, in deed often as a consideration for the awarding of a franchise, dealers are called upon to invest large sums of money in refining and developing their operations, . . . Section

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[3] This holding, of course, stands as the law of this case. *See Arizona v. California*, 460 U.S. 605, 619 (1983); *Loveday v. State*, 296 Md. 226 (1983). The recitation of the holding here is not intended to alter or modify that opinion in any manner.

15-209 seeks to protect the dealers' investment from disparagement by a larger, more powerful manufacturing entity.

By reorganizing its presence in the marketplace in the way it did, GM seeks to and possibly imposes the very type of harm that the Maryland statute seeks to prohibit. GM in effect, negated the investment which Central has made in the heavy-duty truck aspect of its operation by canceling its heavy-duty truck franchise. In essence, it has put out of business the heavy-duty truck franchise of Central GMC. And that is part of the cost that GMC foresaw would result from creating a new dealer network. Having however done so, GMC cannot under Maryland's statute enforce upon its dealers, or former dealers, the cost of its business judgments about the manner in which it will cease to distribute its heavy-duty trucks or the successors thereto in the marketplace formerly occupied by its former dealers.

In its reorganization, GMC acted in a manner that under Maryland's statute is without just cause. It terminated Central GMC in a manner that the statute expressly addresses. It acted in a highly discriminatory fashion. From the time it first announced its plans to form the joint venture in its letters of 1986, until it notified Central GMC of the cancellation of the heavy-duty truck addendum in December of 1987, this record shows a cat and mouse game where GM enticed the dealer to continue sales efforts on behalf of GM trucks by dangling the possibility of an award of a franchise with the joint venture while being perfectly aware in its own corporate mind that few, if any dealers, would in fact be offered a contract under Volvo GM. . . . Under the terms of the joint venture,

> I find therefore, that GMC participated actively in setting up the new entity's network of dealer franchises. In short, GMC exercised its right to decide which dealer would survive and go on as a representative in the new network and which would not. Therefore, within the meaning of Section 15-209, there has been a wrongful termination of the franchise, and accordingly, it triggers that segment of the statute which calls for the determination of the going concern value of the heavy-duty aspect of Central GMC's operation.

Transcript of May 4, 1988, Bench Opinion at 100-103.[4]

Turning to the methodology employed for determining the "value of [Central's franchise] as a going concern" as of December 31, 1987, the parties generally agree on the applicable legal principles. Indeed, very little of this trial concerned competing visions of the law; on the contrary, this trial was almost exclusively a battle over contrasting factual assertions. The outcome of this valuation trial turns, consequently, almost exclusively on the Court's resolution of the disputes of fact

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[4] Much to the Court's chagrin, a great deal of the evidence presented at trial of this action addressed the issue of GM's liability under § 15-209 rather than the issue of the going concern value of Central's franchise. While both parties were guilty in this regard, the Court noted at the time—and now reiterates—its displeasure at GM's repeated attempts to relitigate the Court's determination that GM unlawfully terminated Central's franchise. In any event, the testimony presented only served to confirm the Court's conclusion that GM remained in the heavy duty truck market after the execution of the Volvo/GM joint venture. In particular, GM's "fact" witness Elmo Sergo—who has held a number of very senior positions in GM's truck division, who was intimately involved in the negotiation of the Volvo/GM joint venture, and who is currently the manager of the medium and commercial light trucks for GM's truck and bus division—offered testimony which established that GM never left the heavy duty truck market. Sergo's testimony served to fortify the Court's conclusion that GM was liable under Maryland law for its termination of Central heavy duty truck franchise.

which, as will be discussed in greater detail below, was greatly influenced by the varying credibility of the parties' witnesses.

The "fair market value" of a business is defined as "[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." Black's Law Dictionary 537 (5th ed. 1979); *Rosenberg v. Rosenberg*, 64 Md. App. 487, 525-26, *cert. denied*, 305 Md. 107 (1985) (quoting Black's Law Dictionary). *See Estate of Thompson v. Commissioner of Internal Revenue*, 864 F.2d 1128, 1131 (4th Cir. 1989) (quoting Treasury Regulations codified at 26 C.F.R. 20.2031-1(b)). One way to determine the fair market value of a business – and the method prescribed by § 15-209(f) – is to appraise the value of the business as a going concern. While there are various methods to determine the going concern value of a *business,* the most appropriate method is termed the *"earnings* capitalization approach."[5] This method assigns a fair market value of a business based on the expected future earnings of the business. *See National Rural Utils. Co-op Fin. Corp. v. Wabash Valley Power Ass'n. Inc.*, 111 Bankr. 752, 768 (S.D. Ind. 1990). As a mathematical matter, the going concern value is calculated by dividing the pre-tax earnings of a business by the difference between a fair rate of return and the inflation rate. That is:

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[5] The earnings capitalization approach calculates the going concern value of a company by looking at earnings and cash flow capacity. The future stream of income that would accrue to the owner of the business is estimated with this approach. The other two commonly employed approaches are the market approach – which calculates the value of a business by comparing it to the actual sales of comparable businesses in the free marketplace – and the underlying assets approach – which calculates the value of a business by determining the aggregate fair market value of the all the assets and liabilities of the business. Given the nature of the business to be valued, the parties agree – and the Court concurs – that the earnings capitalization approach is the only reasonable methodology for calculating the going concern value of Central's terminated franchise.

$$\text{Going Concern Value} = \frac{\text{Pre-tax Earnings}}{\text{Fair Rate of Return - Inflation}}$$

Deriving the figures to be used in this equation requires a number of assumptions, each of which is well-based in the applicable law. First, pre-tax earnings include only the net profit of the business to be valued. That net profit is calculated by subtracting the business's costs from the business's gross profits. However, because only a portion of Central's business is being valued,[6] only those gross profits and costs associated with the GM heavy duty portion of Central's business prior to December 31, 1987,[7] are assayed in calculating the relevant net profit. Moreover, only those costs – termed "variable" costs – which are tied directly to the performance under the heavy duty addendum are subtracted from gross profits. The "fixed" costs of doing business, which Central continued to bear after the termination of the GM heavy duty franchise, are not subtracted from the GM heavy duty gross profits in arriving at net profit. *David Sloane. Inc. v. Stanley G. House & Assocs. Inc.*, 311 Md. 36, 44 50 (1987); *Martin Motor Sales Inc. v. Saab-Scania of*

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[6] Only the heavy duty addendum to the GM Dealer Sales and Service Agreement was canceled. As a result, Central continued to stay in business and to provide other services to its Customers. The business being valued in this trial, accordingly, is that portion of Central's business that can no longer be performed due to the franchise termination. *See Standard Oil of California v. Moore*, 251 F.2d 188, 216 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

[7] As was repeatedly stressed at trial, the Court is valuing the expected stream of income associated with the GM heavy duty portion of Central's business as of December 31, 1987. Events occurring subsequent to that date are not relevant in this analysis. In particular, the wrongful acts of GM that affected the heavy duty truck market after December 31, 1987 – and to some extent, in the months preceding that date – are not relevant in deriving the going concern value of Central's terminated franchise. GM will not be permitted to benefit from its wrongful conduct. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949).

America Inc., 452 F. Supp. 1047, 1054 (S.D.N.Y. 1978), *aff'd* 595 F.2d 1209 (2d Cir. 1979).[8]

The identification of these costs, like the identification of all the variables that go into the calculation of the going concern value of Central's terminated franchise, need not be absolutely precise. "'[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Moreover, the proof may be indirect and may include estimates based upon assumptions. It is only necessary that the assumptions rest on adequate data." *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984) (citations omitted). *See also Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1332 (D. Md. 1989); *Ricky Smith Pontiac v. Subaru of New England*, 14 Mass. App. 396, 440 N.E.2d 29, 48 (1982), *review denied*, 387 Mass. 1103 (1983).

In arriving at the "fair rate of return" for the denominator of the equation, both parties employed a methodology termed a "capital assets pricing model" ("CAPM"). "The CAPM method measures the risk associated with a specific investment relative to the risk of a portfolio of investments, and prices or values of that investment relative to the return on the portfolio." *In re Pullman Constr. Indus.*, 107 Bankr. 909, 922-923 (Bankr. N.D.

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[8] As the Maryland Court of Appeals explained, "some costs are more directly related to the performance of individual contracts than are others, and their amount will vary with the volume of sales output. . . . [O]ther expenses will remain relatively stable through a given range of output because they bear no direct relationship to the individual contracts. Accountants and economists refer to these two distinct kinds of costs as variable and fixed; the latter is also commonly referred to as overhead." *Sloane*, 311 Md. at 44 n.4.

Ill. 1989).[9] As part of this methodology, a "beta" is selected which reflects an appropriate approximation of the risk differential between an investment in a small company, like Central GMC, as compared to the market as a whole. *In re Pullman*, 107 Bankr. at 923 ("The 'beta' coefficient measures the risk of an investment in Pullman's business relative to the risk of the market as a whole."). *See also In re The Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 531 F. Supp. 1191, 1233 (Regional Rail Reorg. Ct. 1981). Because Central was not publicly traded, and thus had established no track record for performance that would yield a precise determination of the appropriate beta to be employed, a beta was derived by looking at the performance of selected comparable publicly-traded corporations. *In re Pullman*, 107 Bankr. at 923. Both Central and GM used this method to determine the beta.[10]

With the Court's prior holding and these general principles of law in mind, the Court turns to the evidence offered at trial.

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[9] The specific equation used is as follows:

FRR = R(f) + [beta x (R(m) - R(f))] + [R(s) - R(m)] where:

FRR = Fair rate of return
R(f) = risk free rate of return
beta = coefficient of risk for particular business
R(m) = market rate of return on equity
R(s) = market rate of return on equity for a small business

The difference between the market rate of return on equity and the risk free rate of return is termed the "large company risk premium." The difference between the market rate of return on equity for a small business and the general market rate of return on equity is termed the "small company risk premium." *See In re Pullman*, 107 Bankr. at 923.

[10] The parties differed on the precise beta to be used. They did not differ, however, on the other figures that went into the CAPM equation. *See* note 9, *supra*.

II. Findings of Fact

A. Central's Business Operations

1. Central GMC, located in Landover, Maryland, at the intersection of Maryland Route 50 and Interstate 95, is a full service truck dealer offering both sales and service. It holds franchises from a number of truck manufacturers, including General Motors and Kenworth, as well as from truck accessory and parts manufacturers. Defendant's Exhibit 1 ("Def. Exh. ___"). Its 36,000 square foot facility consists of 21 service bays and a main building in which sales of trucks and parts is conducted. Plaintiff's Exhibits 71D-71L ("Pltf. Exh. ___").

2. Central held, and continues to hold, a Dealers Sales and Service Agreement from General Motors Corporation. Pltf. Exhs. 17 & 23. Until December 31, 1987, Central also held an Addendum to the that Agreement, termed a heavy duty addendum, that permitted Central to sell GM heavy duty ("GMHD") trucks, to purchase GMHD exclusive propriety parts at dealer discount for servicing GMHD trucks, and to perform warranty work on GMHD trucks. Def. Exh. 63 & Pltf. Exh. 26.

3. Central's GMHD truck business operations was divided into six departments, only five of which produced any significant profit:

a. The New Vehicle Department sold new GM Astro, General, and Brigadier heavy duty trucks on an individual and fleet basis. For the most part, the new trucks sold were made to the customer's specifications. *See, e.g.*, Pltf. Exhs. 3F, 3G & 3H.

b. The Used Vehicle Department purchased used GMHD trucks, usually as trade-ins on a new vehicle sales, and resold the vehicles. *See, e.g.*, Pltf. Exhs. 4A & 4B.

c. The Parts and Accessories Department sold exclusive proprietary GMHD parts as well as non-exclusive GMHD parts, GM medium and light duty parts, and generic parts.

d. The Mechanical and Body Shop Departments provided a full range of routine service and repair to owners of GMHD trucks. Both Departments were fully certified by GM and were open 24 hours per day.

e. The Leasing and Rental Department leased and rented a variety of trucks, including GMHD trucks. Income derived from the GMHD portion of this Department, however, was negligible.

4. By GM's measure, Central performed its duties under its franchise agreement extraordinarily well. Since the inception of GM's "Five Star General" program in 1985 (which rewards a select few of GM's franchisees for outstanding performance), Central has been recognized every year. Moreover, Central's parts department has been fully certified by GM every year since 1982.

5. GM terminated Central's heavy duty addendum effective December 31, 1987. Pltf. Exhs. 55 & 62; Def. Exh. 7.

6. Central was not offered a franchise in the new Volvo/GM joint venture company. Pltf. Exh. 61; Def. Exhs. 18 & 19. In order to continue being able to service GM heavy duty trucks, Central entered into an affiliated dealer agreement with Weber's White-GMC, Inc. Pltf. Exh. 70. The arrangement, which is terminable without cause by either party on 30 days notice, is far less attractive financially to Central than a franchise agreement.

B. Valuation Studies of Central's GM Heavy Duty Truck Franchise

7. Central hired Terry Korn, a partner in the accounting firm of Coopers & Lybrand, to conduct a valuation study of Central's GMHD truck franchise as of December 31, 1987. Mr. Korn, who is the national director of valuation services for Coopers & Lybrand, testified as an expert. Fed. R. Evid. 702.

See Pltf. Exh. 1K (Korn abbreviated resume). His report ("Korn Report"), which consists of nine pages of narrative and 45 schedules, was received in evidence. Pltf. Exh. 1.

8. GM hired Steven J. Matt, a manager in the Appraisal and Valuation Group in the Dallas, Texas, office of Arthur Anderson & Company, to conduct a valuation study of Central's GMHD truck franchise. Def. Exh. 61A. On direction of counsel, however, Matt based his valuation "in substantial part upon the recognition that as of December 31, 1987, General Motors' GMC Truck Division ceased marketing heavy duty trucks to its dealers. Def. Exh. 61 for Identification Only at 4. This direction was in direct contravention of the Court's holding that GM did not exit the heavy duty truck market but, rather, simply shifted its operations into the joint venture with Volvo. Because Matt premised his valuation study on a faulty understanding of the law of this case, his conclusion (that the going concern value of Central's GMHD truck franchise as of December 31, 1987, was somewhere in the range of $0 to $8,500) was not received in evidence. Matt's testimony was helpful, and therefore admissible, only to the extent that he critiqued the Korn Report.

9. Using an earnings capitalization approach, Korn concluded that the going concern value of Central's GMHD truck franchise as of December 31, 1987, was "reasonably stated" as $2,897,456, which was rounded to $2,900,000. Pltf. Exh. 1, Schedule 1.

10. Korn arrived at this conclusion by determining that the average pre-tax earnings (i.e., pre-tax net profit) for Central's GMHD truck franchise for the five years preceding December 31, 1987, was $463,593. The fair rate of return was determined to be 20% and the inflation rate was determined to be 4%. Pltf. Exhs. 1A, 1L, & 1M. Thus:

$$\text{Going Concern Value} = \frac{\$463,593}{20\% - 4\%} = \$2,897,456$$

C. Five Year Average Net Earnings of Central's GM Heavy Duty Truck Franchise

11. The $463,593 figure represents the combined five year average net profit attributable to Central's GMHD truck franchise for the five independent profit-generating departments: New Vehicle Sales; Used Vehicle Sales; Parts; Mechanical; and Body Shop.

12. Schedules 8-12 of the Korn Report present the yearly figures for Central's New Vehicle Department, beginning in 1987 and going back to 1983. Pltf. Exh. 1C. As indicated in note 1 to the schedules, the figures for the net sales and gross profits associated with the sales of new GMHD trucks were derived from the yearly operating statements submitted by Central to GM.[11] In addition, every one of the 330 files generated from the

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[11] These yearly operating statements, which set forth in great detail all the operations of Central, were received in evidence. Pltf. Exhs. 8A1-8A5. The last of these operating statements, plaintiff's exhibit 8A5 was a "working" copy of the operating statement for 1987. This was the copy provided by Central to GM in the course of discovery. At trial, however, Central provided the final version of the 1987 yearly operating report which amended in minor respects the figures set forth on Plaintiff's Exhibit 8A5. The final report was entered into evidence as Plaintiff's Exhibit 8A5a. At trial, both parties agreed that the conclusions in the Korn Report had to be revised to reflect the differences between Plaintiff's Exhibits 8A5 and 8A5a. In particular, the figure for net profit for Central's overall operation for 1987, which appears on Schedule 2 of the Korn Report, was reduced by $47,789 from $349,972 to $302,183. When this alteration was carried through, Korn's conclusion that the going concern value of Central's GMHD truck franchise was $2,897,456 was reduced to $2,837,719, a difference of $59,737.

The Court's review of the relevant exhibits reveals, however, that the Korn report relied upon the figures appearing on the final 1987 operating statement (Pltf. Exh. 8A5a), not the preliminary draft (Pltf. Exh. 8A5). Three examples confirm this conclusion:

- First, as noted above, Schedule 2 of the Korn report states that the overall net profit of Central's operation in 1987 was $349,972. The corresponding figure on the draft operating

sale of new GMHD vehicles from 1983 through 1987 was reviewed. The schedules list the figures for the GMHD portion of Central's business separately from the remainder of Central's new truck sales business (termed "Other").

13. Also appearing on Schedules 8-12 are the allocation of variable expenses between the GMHD truck portion of Central's business and the remainder of Central's business. These expenses are deducted from the gross profit figure to arrive at the net profit for the New Vehicle Department. Notes 5, 6, 7, 8, 9, 11, 12, 13, and 14 indicate how these variable expenses were allocated between the GMHD truck portion of the business and Central's "Other" business.[12]

14. The gross profit, total expenses and net profit figures for each year from 1983 through 1987 for the New Vehicle Department as presented in the Korn Report are as follows:

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report, which appears on page 1, row 58 right, is $302,186; on the final operating report, the figure is $349,972;

- Second, note 4 to Schedule 8 of the Korn report shows that for 1987, the gross profit for the sale of new GMHD General trucks was $223,697. The corresponding figure on the draft operating report, which appears on page 3, row 39 left, is $224,697; on the final operating report, the figure is $223,697;

- Finally, on Schedule 14 of the Korn Report, the 1987 gross profit for the sale of used vehicles is stated as $83,445. The corresponding figure on the draft operating report, which appears on page 3, row 16 right, is $83,146; the corresponding figure on the final operating report is $83,445.

What this comparison quite clearly reveals is that the Korn Report relied upon the figures in the final operating report in drawing its conclusions regarding Central's going concern value. The amendments to the Korn Report's conclusions adopted by the parties at trial, therefore, will not be accepted.

[12] This format for setting out the data is followed in the Schedules for the Used Vehicle Department (Schedules 8-13), and the combined Parts, Service and Body Shop Departments (Schedules 14-19). The income derived from the Leasing and Rental business was *de minimis* and, therefore, was not included in the calculation of going concern value. Pltf. Exh. 1F.

	gross profit	expenses	net profit
1983:	$ 124,227	$ 65,130	$ 59,097
1984:	355,294	192,070	163,224
1985:	422,240	217,419	204,821
1986:	375,623	177,269	198,354
1987:	313,795	149,107	164,688

15. The five year average gross profit of Central's New Vehicle Department attributed to its GMHD truck franchise comes to $318,236; the five year average net profit of Central's New Vehicle Department attributed to its GMHD franchise comes to $158,037. *See* Schedule 13.

16. Schedules 14-18 of the Korn Report present the yearly figures for Central's Used Vehicle Department, beginning in 1987 and going back to 1983. Pltf. Exh. 1D. As indicated in note 1 to these schedules, the figures for net sales and gross profits were derived, like the figures for the New Vehicle Department, from Central's yearly operating reports submitted to GM.

17. The net profit figures for each year from 1983 through 1987 for the Used Vehicle Department as presented in the Korn Report are as follows:

	gross profit	expenses	net profit
1983:	$ 26,929	$ 15,444	$ 11,485
1984:	28,227	17,040	11,187
1985:	3,618	8,040	(4,422)
1986:	21,046	17,931	3,115
1987:	26,336	19,121	7,215

The five year average for the gross profit of Central's Used Vehicle Department attributed to its GMHD truck franchise comes to $21,231; the five year average for the net profit of Central's Used Vehicle Department attributed to its GMHD franchise comes to $5, 7 16 . *See* Schedule 19.

18. Schedules 26-30 of the Korn Report present the yearly figures for Central's Mechanical, Body Shop, and Parts & Accessories Departments, beginning in 1987 and going back to 1983. Pltf. Exh. 1E. As indicated in note 1 to these schedules, the figures for net sales and gross profits were also derived from Central's yearly operating reports submitted to GM.

19. Schedules 20-24 present the combined totals for these three Departments by year, again beginning in 1987 and going back to 1983. These five schedules follow the format presented in Schedules 8-12 and 14-18 of setting that portion of the business attributable to the GMHD truck franchise separately from Central's "Other" business.

20. The segregation of Central's parts and repair business into that portion attributable to its GMHD franchise as opposed to the rest of its business was conducted in accordance with a protocol devised by Coopers & Lybrand in association with Central personnel, especially James Burgess, the President and General Manager of Central.

21. With regard to the over-the-counter sale of parts, sales invoices bearing totals over $500 initially were separated from those invoices bearing totals under $500. Every sales invoice totalling over $500 was independently analyzed by Coopers & Lybrand, while a statistically significant sample of those invoices under $500 was analyzed.[13] The classification procedure employed is as follows:

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[13] For the years 1983 through 1987, there were approximately 132,500 parts invoices, of which only approximately 5000 had total sales over $500. Rather than analyzing each of the approximately 125,000 under $500 invoices, the parties agreed to analyze only a sample of the under $500 invoices. Approximately 550 under $500 invoices for each year were selected at random for analysis. Pltf. Exh. 6D. The parties stipulated that the sample of the under $500 invoices was statistically significant and adequately represented the universe from which the sample was drawn. *See* Stipulation dated June 12, 1990.

a. Invoices for heavy duty parts were separated from invoices for non-heavy duty parts;

b. Invoices for heavy duty parts were then separated into three categories: The "G" category included invoices for heavy duty parts in which either the first part listed, the most expensive part, or the primary part was a GMHD exclusive proprietary part; the "K" category included invoices in which a Kenworth heavy duty part was the first part listed, the most expensive part, or the primary part; and the "Z" category included invoices in that did not fall within either of the other two categories.

c. The remaining "Z" invoices were then sorted by customer, depending on whether the particular customer owned GMHD trucks or not. The "Z" invoices for three specific high-volume customers – Driggs, Ryder, and Merit Concrete – and for customers who were themselves parts dealers, were divided half-and-half between GMHD and non-GMHD to reflect the composition of those customer's fleets.[14]

22. The combination of the invoices sorted as "G" initially and those attributed to GMHD from those sorted as "Z" initially constitute the invoices whose dollar amounts from parts sales were attributed in the Korn Report to Central's GMHD franchise.

23. Schedule 34 demonstrates how the results of the statistical sampling were translated into dollar figures for all under $500 parts invoices for each year from 1983 to 1987. Pltf. Exh. 1H.

24. Schedule 33 adds the dollar amounts from Schedule 34 to the dollar amounts drawn from all the over $500 invoices to arrive at total GMHD parts sales gross profits for each of the five years analyzed. Pltf. Exh. 1H.

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[14] The work sheets for the over $500 invoices are Plaintiff's Exhibits 6B1-6B5. The work sheets for the sample of the under $500 invoices are Plaintiff's Exhibits 6E1-6E5.

25. GM challenged the reliability of the protocol employed by Coopers & Lybrand to distinguish those parts sales attributable to Central's GMHD truck franchise from those parts sales that could have occurred (and, hence, could still occur) absent a GMHD truck franchise.

26. Stuart MacKay, a truck industry analyst retained by GM, testified that the protocol used by Coopers & Lybrand significantly overstated the dollar value of the parts sales attributable solely to Central's GMHD franchise. The Court, however, does not rely at all upon MacKay's testimony because the Court finds MacKay wholly lacking in credibility.

27. First, the so-called reliability check that MacKay conducted was itself so unreliable as to be of no use in assessing the accuracy of Coopers & Lybrand's calculations. MacKay only analyzed a portion of those invoices identified as "G" by Coopers & Lybrand.[15] From his part-by-part analysis of a selected sample of invoices, he concluded that many parts sales were counted as GMHD parts sales incorrectly. However, by only looking at those invoices identified as "G", MacKay's results were utterly undependable. It is entirely to be expected, given the protocol used to segregate the invoices, that invoices identified as "G" would also contain parts that were not GMHD parts; as a result, some sales were incorrectly attributed to Central's GMHD franchise that could have occurred absent a GMHD franchise. At the same time, it is entirely to be expected that invoices identified as "K" would contain some parts that were GMHD parts; those parts, of course, were sold only because Central held a GMHD franchise. MacKay's analysis, however, did not account for this fact. By only analyzing a skewed sample of all the parts invoices, his results were similar-

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[15] The Court notes that the sample of invoices analyzed by MacKay were selected by counsel for GM. In the Court's experience, trustworthy experts do not rely solely on counsel to select the data upon which their opinions are based. Moreover, in the Court's experience, counsel generally do not provide their experts with a skewed data base upon which to rest their opinions.

ly skewed to overstate any error in the Korn Report's calculation.

28. Second, MacKay's testimony is suspect because of the manner in which MacKay conducted himself in the pretrial stages of this litigation. Rather than providing opposing counsel with the analyses he performed and intended to introduce at trial, MacKay "hid the ball" by not generating his results until the trial had begun. As a result, counsel for the plaintiff was unable to adequately depose MacKay in preparation for trial. The Court also notes that at his deposition, MacKay willfully mislead plaintiff's counsel concerning the data he relied upon in forming his opinions and refused — without legal justification — to permit plaintiff's counsel to have access to that data.[16] Accordingly, the Court cannot rely with confidence on any testimony offered by MacKay.

29. The Court finds that the protocol employed by Coopers & Lybrand in sorting the parts invoices between those parts sales attributable to Central's GMHD franchise and the remainder of Central's business was reasonably accurate and fully acceptable.

30. With regard to the Mechanical and Body Shop Departments, Coopers & Lybrand personnel analyzed every repair order generated from 1983 to 1987. The repair orders were divided into work done on GMHD trucks, Kenworth trucks, and other trucks. Each of those categories was divided into the amount attributable to parts and the amounts attributable to labor. Those amounts were further divided to reflect the difference between the sale price for the parts or labor and the actual cost to Central, thereby revealing the gross profit. Pltf. Exhs. 7B1-7B5; 7B6 (1983-1987 aggregate summary).

31. Schedule 32 sets out the gross profit earned from repair orders together with the gross profit earned from over-the-counter parts sales (termed "wholesale parts" on Schedule 32;

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[16] The Court refers here to the "green binder" incident, which was fully explored during cross examination of MacKay.

drawn from Schedule 33) to arrive at a combined figure for gross profit attributed to the GMHD franchise for the Parts, Mechanical, and Body Shop Departments for each year from 1983 to 1987.

32. The combined gross profit figures for the Parts, Mechanical, and Body Shop Departments set forth on Schedule 32 appear on Schedules 20-24, which compare the amounts attributed in the Korn Report to Central's GMHD franchise to the amounts attributed to the remainder of Central's business. After subtracting expenses allocated to the GMHD portion of Central's business, the following net profit figures for years 1983 to 1987 for the combined Parts, Mechanical, and Body Shop Department were derived:

	gross profit	**expenses**	**net profit**
1983:	$ 353,105	$ 62,027	$ 291,078
1984:	365,755	69,545	296,210
1985:	456,368	84,322	372,046
1986:	348,376	68,517	279,859
1987:	316,718	56,712	260,006

The five year average gross profit for the combined Parts, Mechanical, and Body Shop Departments attributed in the Korn Report to Central's GMHD franchise comes to $368,064; the five year average net profit for the combined Parts, Mechanical, and Body Shop Departments attributed to Central's GMHD franchise comes to $299,840. *See* Schedule 20.

33. Schedules 2-6 to the Korn Report present the total gross profits, expenses, and resultant net profits for each year beginning with 1987 and going back to 1982. These Schedules are aggregations of Schedules 8-12, 14-18, and 20-24.[17] The figures are as follows:

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[17] For example, Schedule 2, which presents the totals for 1987, is the aggregate of Schedules 8, 14 and 20.

	gross profit	expenses	net profit
1983:	$ 2,643,864	$ 2,403,586	$ 242,654
1984:	3,094,654	2,787,712	320,794
1985:	3,358,795	3,313,593	16,254
1986:	4,016,699	3,720,884	424,715
1987:	4,088,110	3,926,453	349,972

34. Schedule 7 to the Korn Report presents the average five year totals derived from Schedules 2-6. The average five-year gross profit attributed in the Korn Report to Central's GMHD franchise, according to Schedule 7, is $707,531. Reducing the gross figure by the average five year expenses attributed to Central's GMHD franchise of $243,939, yields an average five year net profit before taxes of $463,592. This figure was used as the numerator in the earnings capitalization formula. *See* Schedule 1.

35. The allocation of expenses in the Korn Report was very optimistic from the point of view of the hypothetical buyer of Central's GMHD truck franchise. As is seen in Schedules 2-25, no amounts at all were allocated to the GMHD portion of Central's business for several of the categories of expenses. Instead, all the amounts for certain expenses—deemed to be fixed expenses— were allocated to the remainder of Central's business (termed "Other" in the Schedules).

36. The assumption underlying the allocation of certain expenses entirely to the "Other" category is that a hypothetical buyer of Central's GMHD new truck sales business would be able to generate the specified quantity of sales (averaging approximately $3.5 million per year, *see* Schedule 13) without incurring any additional expenses for rent; heat, light, power and water; repairs to equipment; etc.

37. GM's two expert witnesses challenged this assumption. Matt testified that he found the allocation of expenses to be unreasonable not only because it assumed that a hypothetical

buyer could generate the specified sales without incurring any non-allocated expenses, but also because it led to the result that a large portion of Central's business – the portion not associated with the GMHD franchise – produced no profit while a fraction of the business attributable to the GMHD franchise produced large profits.

38. Matt pointed, for example, to Schedule 13 of the Korn Report, which presents the five year averages for the New Vehicle Department. Over the five years from 1983 to 1987, 66 new GMHD trucks were sold generating a gross profit $318,236 and, after deducting the allocated expenses, a net profit of $158,037. During the same time period, 483 non-GMHD trucks were sold generating a gross profit of $851,069 and, after deducting the allocated expenses, produced a net *loss* of $22,605.

39. Dr. Shannon Pratt, a nationally recognized business valuation expert, Def. Exh. 62A, also testified that he found the allocation of expenses in the Korn Report to be unreasonable.[18] Dr. Pratt opined that too large a portion of the expenses were determined to be fixed and, therefore, allocated entirely to the non-GMHD category. He testified that hypothetical seller would not continue to incur those expenses in perpetuity; rather, the seller would either reduce the expenses or redeploy assets to take

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[18] The Court is somewhat wary of the reliability of Dr. Pratt's testimony. Dr. Pratt was retained by GM in his capacity as a "review appraiser" to analyze and critique both the Coopers & Lybrand valuation study and the Arthur Anderson valuation study. He found numerous flaws in the Coopers & Lybrand report but found none whatsoever in the Arthur Anderson report. This fact alone raises some question as to the objectivity of Dr. Pratt's opinions and conclusions. The fact, moreover, that Dr. Pratt found no flaws in the Arthur Anderson report which, as noted above, *see supra* para. 8, was based on a faulty understanding of the law of this case, further undermines his credibility. Finally, the fact that Dr. Pratt testified that he relied to some extent on the work of MacKay in reaching his conclusions provokes even more significant doubt as to the dependability Dr. Pratt's conclusions. *See supra* paras. 26 to 28.

advantage of the expenses in the relatively near term. Thus, Pratt concluded, some of the expenses allocated to the non GMHD category should have been allocated to the GMHD portion of Central's business.

40. Both Matt and Pratt suggested that the appropriate manner to allocate expenses between the GMHD and the non-GMHD aspects of Central's business would have been to allocate expenses in proportion to either net sales or gross profit. Since the GMHD portion of Central's business from 1983 to 1987 constituted 20.45% of the net sales ($5,009,514 out of $24,495,761) and 20.57% of the gross sales ($707,531 out of $3,440,424), *see* Schedule 7, Matt and Pratt suggested that 20.55% of Central's expenses from 1983 to 1987 should have been allocated to the GMHD portion of Central's business.

41. The Court finds that the allocation of expenses in the Korn Report understates the amount of expenses properly allocated to the GMHD portion of Central's business. For those line items that allocate some expenses to the GMHD aspect of Central's business, the Court finds that no correction is needed.[19] However, the Court finds that some expenses should have been allocated to the GMHD franchise for every category of expenses. Otherwise, the value of the GMHD franchise to the hypothetical buyer would be overstated; the hypothetical buyer could not expect to generate income from the franchise without incurring some expenses that are not allocated in the Korn Report.

42. In order to correct the lack of allocation of expenses for several line items, the Court will allocate 10% of the five year average expenses of the non-allocated line items to the GMHD

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[19] The Court notes that GM's witnesses did not challenge any actual allocations in the Korn Report. Rather, Matt's and Pratt's criticism was directed at the lack of any expense allocation to GMHD in several of the categories of expenses.

franchise.[20] The amount to be added to the total expenses for the GMHD portion on Schedule 7 is $120,287, which causes the total five year average expenses to become $364,226 (i.e., $120,287 added to $243,939).

43. This adjusted expense allocation ($364,226) must be deducted from the five year average gross profit of Central's GMHD franchise ($707,531) to arrive at an adjusted five year average net profit: $343,305. This figure, then, becomes the numerator in the earnings capitalization equation.

D. Fair Rate of Return on Equity for an Investment in Central's GM Heavy Duty Truck Franchise

44. Schedule 35 of the Korn Report presents the calculation of the fair rate of return for investment in Central's GMHD franchise. Pltf. Exh. 1I. As noted above, *see supra* note 9, the determination of the fair rate of return using a capital assets pricing model requires the identification of four variables: the risk free rate of return; the coefficient of risk for Central's GMHD franchise (also termed the beta); the market rate of return equity; and the market rate of return on equity for a small business.

45. The risk free rate of return, set at 9.05%, "was the average yield on long-term U.S. government bonds . . . as of the December 31, 1987 valuation date." Pltf. Exh. 1 at 9; Pltf. Exh. 1I. GM does not contest the use of 9.05% as the risk free rate of return and the Court finds it to be reasonable.

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[20] That is, 10% of the amounts listed on Schedule 7 for the following line items will be added to the total expenses for the GMHD portion of Central's business: Salaries-Owners; Other Salaries; Absentee Compensation; Used Vehicle Maintenance; Company Vehicle; Outside Services; Miscellaneous; Rent; Amortization-Leaseholds; Repair-Real Estate; Depreciation-Bldg.; Taxes-Real Estate; Insurance-Bldg.; Interest-Mortgages; Heat, Light, Power & Water; Insurance-Other; Taxes-Other; Repairs-Equipment; Depreciation-Equipment; Equipment-Rental. The sum of these line items is $1,202,872.

46. The market rate of return on equity, which is an estimate of what rate of return an investor in large publicly traded companies would require, was determined to be 12.1%. Pltf. Exh. 1 at 9; Pltf. Exh. 1I at note 3. When the risk free rate of return is subtracted from this figure, the large company risk premium of 7.4% is derived. GM did not contest the use of 12.1% as the market return on equity and the Court finds it to be reasonable.

47. The market rate of return on equity for a small business, which is an estimate of the additional return that an investor in a small company (such as Central's GMHD franchise) would demand, was determined to be 18.2%. Pltf. Exh. 1 at 9; Pltf. Exh. 1I at note 4. When the market rate of return on equity (12.1%) is deducted from this figure, the small company risk premium of 6.1% is derived. GM did not contest the use of 18.2% as the market rate of return for a small business and the Court finds it to be reasonable.

48. The beta "is indicative of the risk differential between investments in a particular industry as well as individual companies as compared to the risk associated with equity investments in a diversified portfolio of stocks." Pltf. Exh. 1 at 9. A beta equal to 1.00 represents the average volatility of the 500 companies included in the Standard and Poor's 500. If a company has a beta lower than 1.00, that company is less volatile (i.e, an investment in that company is less risky) than the average company in the Standard and Poor's 500.

49. Korn calculated the beta for Central's GMHD truck franchise to be 0.7. Since GMHD franchises are not publicly traded, the beta to be used for valuation purposes could not be gleaned from examining the past performance of such businesses. Instead, Korn arrived at a beta equal to 0.7 by looking at four "comparable" publicly-traded businesses.[21] Their average beta was 0.702, which was rounded to be 0.7. Pltf. Exh. 1I.

[21] The comparable businesses were all in the automotive parts sales business. None were in the heavy duty truck market and none sold vehicles.

50. In cross-examination, Korn acknowledged that his calculation of the beta did not take into account the actual earnings history of Central's business which, as Schedules 2-6 to the Korn Report demonstrate, fluctuated considerably.[22] The calculation of the beta also did not consider business in the heavy duty truck market, which, as a general matter, is a fairly volatile market. Finally, the four comparable businesses relied upon by Korn in calculating the beta all had far wider geographic markets than Central. The stability of a business is increased—and, consequently, its beta is decreased—when its operations are spread out over a wider geographic market.

51. The Court finds that these considerations compel an upward adjustment of the beta. GM, however, did not offer competent evidence on an alternative beta.[23] At trial, a beta of 1.00 was used often as a reasonable substitute for the beta offered in the Korn Report. The Court finds, therefore, that a beta equal to 1.00 is appropriate.

52. Using a beta of 1.00, the fair rate of return is calculated to be 22.55%.[24]

Thus, the comparable companies' business only partially overlapped with Central's GMHD franchise business.

[22] *See supra* para. 33, which lists the net profit for Central's business from 1983 to 1987.

[23] Dr. Pratt testified for GM that the appropriate beta to use for Central's GMHD franchise was 1.3. He arrived at this figure by examining the beta for heavy duty truck *manufacturers*. The Court has grave doubts as to the comparability of truck manufacturers, such as GM, to truck dealers; the two businesses are quite unlike one another. In addition, at his deposition Dr. Pratt was asked directly by counsel for the plaintiff whether he thought a comparison to truck manufacturers would be appropriate in determining the beta. Dr. Pratt responded that he did not believe that such a comparison would be proper. *See* Pratt Deposition, p. 179, ln. 7.

[24] FRR = 9.05% + 1 x (12.1% - 4.7%) + (18.2% - 12.1%)
= 9.05% + 7.4% + 6.1%
= 22.55%

E. Inflation Rate

53. The Coopers & Lybrand report estimated the inflation rate to be 4%. GM did not contest the use of this figure. The Court finds it to be reasonable.

F. GM's Collateral Attack on the Korn Report's Valuation of Central's GM Heavy Duty Franchise

54. In November 1987, James Burgess of Central investigated the possibility of selling his entire dealership to William Weber, a competing GM dealer who had been awarded a franchise in the new Volvo/GM joint venture. In a series of letters, Burgess offered to sell his business to Weber for a net selling price of $4,000,000. Pltf. Exhs. 49, 50, 74 & 56.[25]

55. GM contends that the value of a piece of Central's entire business – that is, the GMHD truck franchise – must be assessed in light of the $4 million price put on the business by Burgess in late 1987. The Court finds this contention to be without merit.

56. At the time that Burgess made the offer to Weber, he had been informed orally by the new Volvo/GM joint venture company that he would not be offered a franchise to sell and service the joint venture's heavy duty trucks. Moreover, he had been informed that GM would stop producing GM heavy duty trucks. Thus, the value that Burgess put on his business in late 1987 reflects, at least in part, GM's wrongful termination of Central's GMHD truck franchise. The price put on a dying franchise cannot be relied upon to value what that franchise was worth absent the act that caused it to perish.

57. Moreover, Burgess testified that he had been orally promised by two senior GM officials (Rock and Kramer) that GM would see to it that, if he so desired, Burgess would receive a new dealership if he sold Central to Weber. Given Burgess's

[25] The Volvo/GM joint venture company served as an intermediary in the negotiations between Burgess and Weber because of personal friction between the two men. Def. Exh. 29.

mutually beneficial association with GM for over two decades, Burgess relied on these representations as additional consideration for his sale of Central. The Court credits Burgess's testimony.

58. The Court finds, therefore, that the price affixed by Burgess in the negotiations in late 1987 for the sale of Central's business to Weber is of no probative value in determining the going concern value of Central's GMHD truck franchise as of December 31, 1987.

III.Conclusions of Law

A. Going Concern Value of Central's GM Heavy Duty Franchise as of December 31, 1987

The Court has found, as a factual matter, that the average five year net earnings of Central's GMHD truck franchise is $343,305. The Court has also found that the fair rate of return on equity is 22.55% and the fair inflation rate is 4%. Plugging these numbers into the earnings capitalization equation yields the result that the going concern value of Central's GMHD truck franchise as of December 31, 1987, is $1,850,701. That is:

$$\text{Going Concern Value} = \frac{\$343,305}{2.55\% - 4\%} = \$1,850,701$$

Thus, the Court concludes, that under Maryland Transportation Code § 15-209(f), GM must pay to Central $1,850,701

B. Prejudgment Interest

Central also moved for an award of prejudgment interest. In *Washington Federal Savings & Loan Association v. Prince George's County*, 80 Md. App. 142, *cert. denied* 317 Md. 641 (1989), the court reiterated the long-standing principles of Maryland law regarding the award of prejudgment interest:

> [O]rdinarily the award of prejudgment interest is a matter left to the sound discretion of the trier of fact . . . . [Nevertheless], there are occasions when the allowance of prejudgment interest is recoverable as a matter of right . . . [in] "cases on bonds, or on contract, to pay money on a day certain, and cases where the money has been used. If the contractual obligation be unilateral and is to pay a liquidated sum of money at a certain time, interest is almost universally allowed from the time when its payment was due."

Id., 80 Md. App. at 151 (citations omitted).

Central's recovery under Maryland law for the unlawful termination of its franchise is not the sort of certain and easily defined recovery that leads to an award of prejudgment interest as a matter of right. The Court concludes, however, that Central is entitled to a discretionary award of prejudgment interest. Maryland Transportation Code § 15-209(f) calls for the payment of the going concern value of the franchise at the time that the franchise is terminated. It is now slightly over two and-one-half years since GM terminated Central's GMHD truck franchise. During this time, Central has neither been able to earn the income it would have received had the franchise not been terminated nor has it been paid the fair value of that franchise. If Central had either received the income or received the award, it would have had use of that money for the past two-and-a-half years. An award of prejudgment interest, in other words, simply puts Central in as good a position as it would have been had GM not wrongfully terminated the franchise.

In its initial motion, Central argued that prejudgment interest should be calculated at 10% per annum. GM objected, citing the Fourth Circuit's recent holding in *Federal Savings and Loan Insurance Corp. v. Quality Inns, Inc.*, 876 F.2d 353 (4th Cir. 1989). In that case, the court held that the 10% rate of interest contained in the Maryland Code, Md. Cts. & Jud. Proc. Code

ann. § 11-107, applies only to *post*-judgment interest. The Maryland Constitutional requirement of 6% interest applies to *pre*-judgment interest. Md. Const. art. III, § 57. Central conceded this point in its reply memorandum.

Accordingly, the Court will add to its basic award prejudgment interest at the rate of 6% per annum. Since two-and-one-half years have elapsed since the wrongful termination of Central's GMHD truck franchise, it is entitled to a total of $277,605 in prejudgment interest.[26]

The Court concludes that the total award due Central for GM's wrongful termination of Central's GM heavy duty franchise on December 31, 1987 is $2,128,306.

/s/
Norman P. Ramsey
United States District Judge

DATED: July 5th 1990

[26] Six percent of $1,850,701 is $111,042. Half of that is $55,521. Thus: ($111,042 x 2) + $55,521 = $277,605.

CIVIL ACTION NO. R-88-263

In The

United States District Court

FOR THE DISTRICT OF MARYLAND

CENTRAL GMC, INC.

Plaintiff

v.

GENERAL MOTORS CORPORATION

Defendant

JUDGMENT ORDER

In accordance with the Opinion of the Court issued this 5th day of July, 1990, it is this 5th day of July by the United States District Court for the District of Maryland,

ORDERED AND ADJUDGED:

That judgment is entered in favor of the plaintiff and against the defendant in the sum of $2,128,306, of which $1,850,701 constitutes payment due under Maryland Transportation Code § 15-209(f), and $277,605 constitutes prejudgment interest calculated from December 31, 1987, to date at the rate of six percent per annum.

/s/
Norman P. Ramsey
United States District Judge

Civil Action Number R88-263

In The

United States District Court

FOR THE DISTRICT OF MARYLAND

CENTRAL GMC, INC.

v.

GENERAL MOTORS CORPORATION

Baltimore, Maryland
May 4, 1988

The above-entitled case came on for Hearing on Motion for Summary Judgment before the Honorable Norman P. Ramsey, at 2:30 p.m.

APPEARANCES

FOR THE PLAINTIFFS:

Arnold Weiner, Esquire
D. Christopher Ohly, Esquire
Bruce Mann, Esquire

FOR THE DEFENDANT:

Daniel Goldberg, Esquire
Joseph G. Finnerty, Jr., Esquire

REPORTED BY:

Linda R. Prince
Official Court Reporter

Hearing On Motion For Summary Judgment
Wednesday - May 4, 1988

BENCH OPINION
Excerpt Of Proceedings

THE COURT: All right. First, let me express my appreciation to counsel for the thorough briefing. I have been putting counsel on a bit by suggesting it was overly briefed. In fairness, when going over the briefs, I found it was the attached data which made heavy going of the reading, not the lawyer's work product. Counsel I thought fairly approached the problem. I did find it got a little repetitious but I think that tends to be so when you are responding, replying and rebutting the arguments which you thought you answered when they were first raised; so I am by no means upset by that either.

I am first going to approach the motions for summary judgment which have been filed by both parties in this action.

Originally, General Motors filed a motion to dismiss, which, clearly upon reviewing it in the state of the record which then existed was known by counsel on both sides to really not be a 12(b) motion, but to be a 12(c) motion in that there were materials outside the pleadings which were being put in the record by way of affidavits and other exhibits and it was early recognized, or at least as the materials developed, it was recognized that this really was a matter which was calling for a Rule 56 application. I found on the record before me that both parties have had adequate time to meet and file any and all appropriate affidavits and supplemental material designed to have General Motor's motion considered as a motion for summary judgment under Rule 56; and contrariwise I find it proper for the partial motion for summary judgment filed by Central GMC to be considered as it is appropriately designated, that is to say, as a motion for summary judgment. In addition, I have before me motions first to enforce order staying franchise termination,

second for contempt, and third to clarify, or, in the alternative, to vacate or modify the notice of the Motor Vehicle Administration issued on December 30, 1987. Those motions have also been fully briefed, and I have deferred any argument on those until we dispose of the preliminary one which seems to me to be the major thrust of the case and to generally control it, because disposition of the motion for summary judgment will in large part control the disposition of the assorted other motions which are related to or attached to the basic motions.

Standards for Summary Judgment

The basis for granting summary judgment is well established. Summary judgment shall be granted only if it appears that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. All evidence shall be viewed in the light most favorable to the party with the burden of proof. *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985). But the party must meet the burden of proof by showing more than the existence of a scintilla of evidence; evidence must be produced sufficient for a reasonable jury to find in that party's favor. *Anderson v. Liberty Lobby,* 106 S.Ct. 2505, 2512 91986). This standard "mirrors the standard for a directed verdict." *Id.* at 2511. The party with the burden of proof must produce evidence that would support a jury verdict, "even where the evidence is likely to be within the possession of the [other side], as long as the [party] has had a full opportunity to conduct discovery." *Id.* at 2514. Once the moving party has pointed out the absence of an essential element of the other side's case, the burden is on the other side to make a sufficient showing to create a genuine issue of fact for trial. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986).

Analysis

It is within the context of the legal standard for summary judgment that I view the facts and issues presented by the parties.

The factual and procedural background of this dispute can be stated rather simply. Central GMC is a franchisee of General Motors Corporation. Relevant to today's argument, the Dealer Sales and Service Agreement between the parties that became effective November 1, 1985, contains a heavy-duty truck addendum covering specific product lines, an addendum that later became superseded by an addendum effective October 9, 1986, and actually executed in early November of 1986.

By a memorandum of understanding signed August 15, 1986, the defendant GMC entered into a joint venture with Volvo for purposes of producing heavy duty trucks. Pursuant to their agreement, GMC and Volvo engaged in evaluation and consultations to determine which dealers would be provided franchises for the new entity. By letters dated November 7, 1986, and December 23, 1986, GMC notified its GMC Truck dealers, including plaintiff, of its decision to discontinue all heavy duty truck sales effective December 31, 1987. In December of 1987, GMC notified plaintiff that a dealer agreement would not be offered to Central GMC for the joint venture.

On December 30, 1987, Central GMC initiated proceedings under Md. Transp. Code Ann Section 15-209 by requesting a hearing before the Motor Vehicle Administration to determine if a wrongful termination of franchise were occurring. That same day Maryland's Department of Transportation issued a notice to General Motors that pursuant to Section 15-209 the prior franchise would continue in effect until the Motor Vehicle Administration, after a hearing, determined whether the dealer had failed to comply with reasonable requirements of the franchise. After receiving notice of the stay, GMC filed a petition for removal to this Court pursuant to 28 U.S.C. Subsection 1446(b). Upon consideration of Central GMC's timely

motion to remand, this Court determined that the case was a removable "civil action" within the meaning of 28 U.S.C. Subsection 1441 and that this Court could properly exercise jurisdiction over the matter.

At issue now is the application of Maryland's statutory law to the facts of this case. In 1972, the Maryland Legislature enacted a complex regulatory scheme. See 1972 Md. Laws, ch. 544. Finding and declaring that distribution of motor vehicles "vitally affects the general economy of the State and the public interest and the public welfare," the General Assembly enacted the Franchise Termination Act in order "to regulate... manufacturers engaged in the sale or distribution of [motor] vehicles in the State of Maryland in order to prevent frauds, discrimination and other abuses upon the citizens of the State of Maryland, in order to foster vigorous and healthy competition, to prevent the creation or perpetuation of monopolies and to promote the public safety and welfare..." 1972 Md. Laws, ch. 544. In sum, the Act was designed to serve as a means for dealers, who are rather weak economic units, to bargain on more equal terms with manufacturers, who possess relatively more economic muscle in the marketplace. More succinctly, and borrowing a phrase used by Judge Young, the Act provides a "safeguard against the contracts of adhesion which predominate in the franchise area." *See Bethesda Ford, Inc. v. Ford Motor Co.,* 572 F. Supp. 623, 630 (D. Md. 1983).

Section 15-209 of the Maryland Transportation Code provides, in relevant part, as follows:

> (a) **Manufacturers.** — A manufacturer may not terminate, cancel, or fail to renew the franchise of a dealer, *notwithstanding any term or provision of the franchise* [and I would underscore those words], unless:
>
> (1) The dealer has failed to comply substantially with the reasonable requirements of the franchise; and

(2) Except as otherwise provided by subsection (d) of this section, the manufacturer:

(i) Gives the dealer at least 90 days' prior written notice of the termination, cancellation or nonrenewal and of the specific grounds for the action; and

(ii) Provides the Administration with a copy of that notice.

. . .

(e) **Hearing**. – (1) If a dealer receives written notice that his franchise is being terminated, cancelled, or not renewed, the dealer may, within the notice period required by this section, request a hearing under Title 12, Subtitle 2 of this article to determine whether the dealer has failed to comply substantially with the reasonable requirements of the franchise.

(2) If the dealer requests a hearing under this subsection, the dealer's franchise continues in effect, notwithstanding any term or provision of the franchise or any other provision of this subtitle, until the Administration, after the hearing, makes a final determination.

(f) **Conveyance of dealership on wrongful termination of franchise.** – (1) In addition to any administrative and criminal sanctions imposed under this subtitle, a manufacturer, distributor, or factory branch that terminates, cancels or fails to renew the franchise of a dealer in violation of this section *shall* pay to the dealer the fair value of his business as a going concern.

(2) On payment, the dealer shall convey his business, free of liens and encumbrances, to the manufacturer....

Defendant GMC argues strenuously that there had been no termination of a franchise under the facts of this case. GMC notes that Section 11-125 of the Transportation Article defines "franchise" as "a written arrangement, whether or not for a definite period, in which a manufacturer, distributor, or factory branch, grants to a dealer or distributor a license or right to use a trade name, trademark, service mark, or related characteristic in the sale, leasing, or servicing of new vehicles," and argues that where "as here, the Dealer Sales and Service Agreement between plaintiff and GM which grants to plaintiff the license to use the GM trade name remains in full force and plaintiff continues as a dealer for those trucks manufactured and marketed by GM, the 'franchise' has not been terminated."

Opposition of General Motors Corporation to Plaintiff's Motion for Partial Summary Judgment at 3.

In sum, GM argues that because Central GMC continues to be allowed to use the GM trademark and to sell GM's light and medium duty trucks, that the "franchise" has not been terminated within the meaning of section 15-209. It is a construction with some precedent supporting it that GM relies on. Under similar facts, and construing state statutes using similar terms, if not always for the same purpose as the Maryland statute, some courts have held that there was not termination of a franchise. *See Glick Truck Sales, Inc. v. General Motors Corporation,* No. 88 Civ. 107 (JFK), Slip Op. (S.D.N.Y. April 27, 1988). Cited and relied on by GM. And see the March 24, 1988, letter from Donald E. Williams, Commissioner of Virginia's Department of Motor Vehicles, to Mr. Steve Bayard, President and General Manager of Capital GMC Trucks, Inc., concerning *Capital GMC Trucks, Inc. v. GMC,* wherein the Commissioner found no statutory violation of a regulatory scheme which is somewhat similar to Maryland's.

However, precedent also exists for the converse construction. In at least one case a court ruled that finding whether there

was a franchise termination would require a determination of fact at trial and it therefore refused to grant summary judgment on the issue. *C-B Kenworth, Inc., a/k/a GMC Trucks of Portland v. GMC,* No. 87-0250-P (J. Carter), slip op. at 5 (D. Me. March 25, 1988). And on nearly identical facts, Judge John Shabaz found that the cancellation of a motor vehicle addendum granting the right to sell GMC heavy-duty trucks was the termination of a "franchise" under Wisconsin law in *Mid-State Truck Service, Inc. v. GMC,* No. 87-C-995-S, slip op. at 16 (W.D. WI. March 28, 1988). Similarly, the Pennsylvania State Board of Vehicle Manufacturers, Dealers and Salespersons held that a GMC heavy-duty truck addendum "may be treated as a franchise" within the meaning of that state's statutory law. *In the Matter of General Motors Corporation and Volvo White Truck Corporation Heavy Truck Dealers,* No. 87-6008112, Slip Op. (December 17, 1987).

This brief survey of the caselaw, while not comprehensive, does reveal that significant precedent exists for finding that the cancellation of a heavy-truck addendum to a dealer's sales agreement amounts to the termination of a franchise. In construing Maryland's statute and looking to the intent of that statute, I find the reasoning of these courts to be persuasive. Furthermore, the reasoning of Judge Young on a similar point is persuasive and adds additional support to my so finding. Judge Young wrote:

> Bethesda Ford asserts that the term "the franchise" as employed in Subsection 15-209 only includes the original Sales and Service Agreement. However, the Court perceives no basis for such a restrictive definition of the term "franchise;" the word should instead encompass all oral or written understandings between the franchisor and franchisee, limited only by the possible applicability of the Statute of Frauds or parol evidence rule. [Note omitted.] A broad interpretation

> of the term would provide automobile dealers with a safeguard against the contracts of adhesion which predominate in the franchise area and would further the protective purpose which appears to lie behind Section 15-209.

Bethesda Ford, Inc. v. Ford Motor Co., 572 F.Supp. at 630. Finally, I note that the addendum itself assigns to Central GMC a heavy-duty truck line, and that the primary area of responsibility for that heavy-duty truck line is within a geographic area different from that which is assigned for light and medium trucks, which gives some credence to the belief that the use of the GM logo in connection with the sale of product lines, may be intended to be restricted to a given area insofar as Central GMC is concerned. It appears that the manner in which these geographic areas as assigned are used by the General Motors Company to test the primary responsibility of the dealer give credence to the view that this heavy-duty truck addendum was looked at as a distinct franchise rather than as an additional product line. Accordingly, I hold that where, as here, a heavy-duty truck addendum is cancelled, with all product lines within it being withdrawn from the dealer, that there is a termination of a franchise within the meaning of section 15-209 of Maryland's Transportation Article.

Was there a "wrongful termination of franchise" within the meaning of section 15-209? The statute states that the manufacturer may not terminate the dealer's franchise unless the "dealer has failed to comply substantially with the reasonable requirements of the franchise." There is no evidence before me which would support any finding that this cancellation which I have found, or termination which I have found, was in any way premised on a failure of this dealer to comply substantially with the reasonable requirements of the franchise. That is simply not an issue which has been created on the facts of this case. The statute that Maryland adopted contemplates that termination is

allowable only if there is a finding that there had been a failure on the part of the dealer to comply substantially with the reasonable requirements of the statute. The manufacturer may still terminate a franchise for other reasons, but only at the expense of a forced buy-out of the franchisee's business, which is the penalty imposed by the Legislature of Maryland.

General Motors contends that it has a valid defense to a "wrongful termination of franchise" charge. It argues that where there is a "nondiscriminatory withdrawal by a manufacturer from a marketplace" there cannot be a "wrongful termination of franchise." *Opposition of General Motors Corporation to Plaintiff's Motion for Partial Summary Judgment* at 6. GM's argument here is that changing market conditions, including a highly competitive marketplace for heavy-duty trucks, had caused its products to lose money and that it withdrew from the market. Further, that this withdrawal was nondiscriminatory in that it cancelled all GM heavy-truck addendums, not just selective ones.

GM's argument fails, though, because its withdrawal was neither complete nor was it nondiscriminatory. GM continues to manufacture its Brigadier heavy-duty trucks and it did so at the time it cancelled this dealer's franchise. Now, it has adopted the position that it will sell trucks of the Brigadier-type only to Volvo-GM rather than to the dealers with whom it used to deal. That was a course of action adopted by GM, and it must take the economic consequences of cancellation of a franchise based on its economic needs rather than on any statutorily permissible basis. Until the Brigadier is out of production, GM certainly cannot claim that it is out of the heavy-duty truck market.

Moreover, GM's claim that it is withdrawing from the marketplace for heavy-duty trucks exalts form over substance. The joint venture's name, "Volvo GM," guarantees that GM's trademark will remain visible and enjoy vitality in the heavy-duty truck market. And GM did not enter into the joint venture

until it had assured itself of a percentage of control of the new venture, a number of positions on the board of directors, protection for its interest in its trade name, trademarks and so forth; all this is revealed by the merger documents. And that it had a market for its current production of Brigadiers, which it continues to manufacture. And that future products to be manufactured by Volvo GM would be compatible with engines and transmissions available through GMC's Detroit Diesel Allison Division, thus implying that GM fully intends to maintain a manufacturing capacity in the field of at least a major portion of heavy trucks. The Agreement between GM and Volvo specifies that investment capital, tools, trade secrets, and other contributions GM is to make to the joint venture are expressly the subject matter of contract clauses. These are not altruistic acts. Nor are they the acts of a business which has conceded that it can no longer compete in an area of the marketplace and is leaving the marketplace. By no stretch of the imagination has GM withdrawn from the heavy truck marketplace.

GM's conduct while it has been reorganizing itself within the marketplace demonstrates in the opinion of the Court precisely the type of harm which the statute by the Maryland Legislature seeks to address and to prohibit. Upon obtaining franchises, indeed often as a consideration for the awarding of a franchise, dealers are called upon to invest large sums of money in refining and developing their operations, specifically acquiring obligations for space, buildings, products, parts, service, training of personnel, among other expenses. They devote considerable time to developing goodwill on behalf of the agency and of the product which it sells. If the dealers are successful, the manufacturer profits, for more of its products will be sold. And under section 15-209, failure to succeed in these areas can be cause for termination of the franchise. Section 15-209 seeks to protect the dealers' investment from disparagement by a larger, more powerful manufacturing entity.

By reorganizing its presence in the marketplace in the way it did, GM seeks to and possibly imposes the very type of harm that the Maryland statute seeks to prohibit. GM in effect, negated the investment which Central had made in the heavy-duty truck aspect of its operation by cancelling its heavy-duty truck franchise. In essence, it has put out of business the heavy-duty truck franchise of Central GMC. And that is part of the cost that GMC foresaw would result from creating a new dealer network. Having however done so, GMC cannot under Maryland's statute enforce upon its dealers, or former dealers, the cost of its business judgments about the manner in which it will cease to distribute its heavy-duty trucks or the successors thereto in the marketplace formerly occupied by its former dealers.

In its reorganization GMC acted in a manner that under Maryland's statute is without just cause. It terminated Central GMC in a manner that the statute expressly addresses. It acted in a highly discriminatory fashion. From the time it first announced its plans to form the joint venture in its letters of 1986, until it notified Central GMC of the cancellation of the heavy-duty truck addendum in December of 1987, this record shows a cat and mouse game where GM enticed the dealer to continue sales efforts on behalf of GM trucks by dangling the possibility of an award of a franchise with the joint venture while being perfectly aware in its own corporate mind that few, if any dealers, would in fact, be offered a contract under Volvo GM. Indeed, I note that GM, as I indicated in colloquy with counsel, on October 9, 1986, well after it got into these negotiations with Volvo, made effective a new addendum for heavy trucks in the Central GMC agreement, an addendum that was executed in November of 1986. Under the terms of the joint venture, I find therefore, that GMC participated actively in setting up the new entity's network of dealer franchises. In short, GMC exercised its right to decide which dealer would survive and go on to as a representative in the new network and which would not. There-

fore, within the meaning of Section 15-209, there has been wrongful termination of the franchise, and accordingly, it triggers that segment of the statute which calls for the determination of the going value of the heavy-duty aspect of Central GMC's operation. Partial summary judgment on liability will be granted for Central GMC; and I will ask the parties to provide me with briefing as to the manner in which a determination of appropriate damages under Section 15-209 should be made.

It may well be gentlemen, that this is an appropriate case to be referred to a Master. It may well be that some commonly selected Big 8 accounting firm representative might be an agreeable Master. I am not trying to force a Master situation on the parties, but I simply say to you that where you are required to valuate a business you might get alot more efficiency and a lot quicker result out of an accountant with a sufficient report pursuant to Master rules.

Please within 20 days, give me some briefing on what you consider a procedural technique for approaching the matter of damages; and any suggestions you may have as to whether it should be by supervision under the Court, or by supervision by a special Master.

Having decided to grant the motion of Central GMC for partial summary judgment on liability, the motion to enforce automatic stay, and the motion to hold in contempt I find are now moot.

As to the lost profits and recoverable damages, that will have to abide the day when we finally have that decided.

As to GM's motion to clarify the order of the Motor Vehicle Administration, my ruling today, will also render that moot.

Accordingly, it will be ORDERED:

1) That defendant GMC's motion to dismiss, which has been treated as a motion for summary judgment, is DENIED;

2) That plaintiff Central GMC's motion for partial summary judgment on the issue of liability is GRANTED;

3) That within 20 days the parties will provide me with appropriate briefing on how to approach the damages issue.

(Conclusion of Bench Opinion.)

CERTIFICATE

I, Linda R. Prince, Official Reporter for the United States District Court for the District of Maryland, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and accurate transcript of the proceedings made in the aforementioned and numbered case on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

_____

Linda R. Prince
Official Court Reporter

CIVIL ACTION NO. R-88-263

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

CENTRAL GMC, INC.,

Plaintiff

v.

GENERAL MOTORS CORPORATION,

Defendant

ORDER

A hearing having been held on various motions in the above case Wednesday, May 4, 1988, and for the reasons stated in open court, it is this 5th day of May, 1988, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant General Motors Corporation's motion to dismiss, which has been treated as a motion for summary judgment, is DENIED;

2. That plaintiff Central GMC, Inc.'s motion for partial summary judgment is GRANTED;

3. That within 20 days the parties shall submit briefing on the method for valuating plaintiff's heavy-duty truck franchise;

4. That plaintiff's motions to enforce order staying franchise termination and for contempt and defendant's motion to clarify or, in the alternative, to vacate or modify the notice of the MVA are MOOT; and,

5. That the Clerk of the Court shall mail copies of this Order to all counsel of record.

_____

Norman P. Ramsey
United States District Judge

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

(2)

No. 91-1103

In the
Supreme Court of the United States

OCTOBER TERM, 1991

CENTRAL GMC, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, General Motors Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 946 F.2d 327 (1991).[1]

[1] Pursuant to Supreme Court Rule 29.1, Respondent General Motors Corporation has listed in the Appendix hereto those corporations in which it holds more than 50% but less than 100% of outstanding (voting) shares. General Motors has no parent companies to designate pursuant to Rule 29.1.

Statement of the Case

Central GMC, Inc. ("Central") is a truck dealer in Landover, Maryland, which carries GMC, Mercedes, Kenworth and Iveco trucks. General Motors Corporation ("General Motors" or "GM") is a manufacturer of motor vehicles including trucks produced and distributed by its GMC Truck Division ("GMC Truck").

In 1985, Central and General Motors entered into a GMC Truck Dealer Sales and Service Agreement. Under this Agreement, Central was granted the right to identify itself as an "authorized GMC Truck Dealer" and to use GM trade names and trademarks. Joint Appendix ("JA") 40, 70. Central was also given a "nonexclusive right to buy the new GMC Truck motor vehicles identified in the Motor Vehicle Addend[a]" attached to the GMC Truck Dealer Agreement. Four such addenda listed the various GMC Truck models available for purchase by Central and were changed from time to time as models were added or discontinued by GMC Truck. JA 25, 51-54.

One of these "motor vehicle addenda" listed four GMC "heavy duty" truck models.[2] This heavy duty truck addendum stated that it would "remain in effect unless canceled or until superseded by a new Motor Vehicle Addendum." *Id.* In addition, the GMC Truck Dealer Agreement stated that "General Motors may discontinue any line of Product" and that GM would not be liable for failure to deliver any product as a result of "any discontinuance of manufacture or sale." JA 64.

During the late 1970s and early 1980s, General Motors lost a considerable share of the market for heavy duty trucks and suffered substantial losses on the production and sale of its

[2] The models were the "Astro," "General," "Brigadier J-8000" and "Brigadier J-9500." Of the remaining three Addenda, two pertained to "medium duty" truck models and one listed "light duty" models.

heavy truck models. As a result, in 1986, General Motors decided to discontinue manufacturing these models and so notified its dealers (including Central). JA 25-27.

Effective December 31, 1987, GM ceased marketing its four heavy duty truck models and canceled the motor vehicle addendum to the GMC Truck Dealer Agreement which listed these models. GM also discontinued production of these models during 1987 and 1988 and dismantled, retooled and/or sold its facilities, equipment and other assets previously devoted to their manufacture and sale.[3] Thereafter, although GM no longer offered heavy duty trucks for sale, Central's GMC Truck Dealer Agreement remained in effect and Central continued to act as a fully authorized GMC Truck dealer, able to buy and resell all of the dozens of truck models which continued to be marketed by GMC Truck. JA 26.

Central commenced this action on December 30, 1987, alleging that GM's discontinuation of the GMC heavy duty truck models amounted to a wrongful termination of Central's "franchise," in violation of the Maryland Transportation Code, Section 15-209.[4] On GM's motion for summary judgment, the district court rejected GM's contention that Central's franchise for GMC trucks, namely, the GMC Truck Dealer Agreement, had not been terminated. Instead, the court found that Central had a separate "franchise" for heavy duty truck models only, and granted summary judgment for plaintiff on liability. There-

[3] Some of these assets were conveyed to a new corporation formed by AB Volvo, a Swedish motor vehicle manufacturer, its subsidiaries and General Motors. In exchange for these assets, General Motors received a minority stock interest in the corporation, known as Volvo GM Heavy Truck Corporation. Volvo became the majority stockholder and designated a majority of the members of its Board of Directors. General Motors had no involvement in the corporation's day-to-day activities. JA 28.

[4] Section 15-209(a) provides that "[a] manufacturer may not terminate . . . the franchise of a dealer, notwithstanding any term or provision of the franchise, unless: (1) the dealer has failed to comply substantially with the reasonable requirements of the franchise."

after, following a bench trial on damages, the court awarded Central $1,850,701 as the "fair value" of its "franchise" for heavy duty trucks, together with $277,605 in prejudgment interest.[5]

On appeal, the Court of Appeals for the Fourth Circuit reversed, holding that GM's discontinuation of its four heavy duty truck models did not constitute a termination of Central's franchise under the Maryland Transportation Code. Relying on the definition of "franchise" set forth in the Code,[6] the court of appeals concluded that Central had one franchise for the sale of GMC trucks, and that the motor vehicle addenda appended to the Dealer Agreement were "not separate arrangements [or franchises] between the parties, but rather constituent parts of the whole Truck Dealer Agreement." 946 F.2d at 331 (citation omitted). The court concluded that "GMC has discontinued a product but has not terminated a franchise." *Id.* at 332.[7]

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[5] Section 15-209(f)(1) of the Maryland Transportation Code provides that "[i]n addition to any administrative and criminal sanctions imposed under this subtitle, a manufacturer . . . that terminates, cancels, or fails to renew the franchise of a dealer in violation of this section shall pay to the dealer the fair value of his business as a going concern."

[6] Section 11-125 of the Maryland Transportation Code defines franchise as:

> a written arrangement, whether or not for a definite period, in which a manufacturer, distributor, or factory branch grants to a dealer or distributor a license or right to use a trade name, trademark, service mark, or related characteristic in the sale, leasing, or servicing of new vehicles.

[7] The court added that the interpretation of the Maryland Transportation Code proffered by Central "raises Commerce Clause concerns." 946 F.2d at 334. This constitutional concern was avoided by the court of appeals' interpretation of the Transportation Code, which was independently supported by the Code's "language and purposes." 946 F.2d at 335.

Reasons Why the Petition Should Be Denied

I. No Important Federal Question Is Raised by the Decision Below

This is a diversity action involving the interpretation of a Maryland statute regulating the distribution of motor vehicles within the State. No federal question of any kind — let alone an *important* federal question — is implicated by the decision or record below. The decision is limited to the application of a state statute to a contract between two parties. Under these circumstances, review by this Court is plainly unwarranted. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we [do not] accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"). *See also Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983).

Central attempts to create the appearance of an important federal question by arguing that the Fourth Circuit acted "in disregard" of established summary judgment standards. Pet. 6. In support of its thesis, Central points to the fact that "the Fourth Circuit did not cite *Anderson*, *Celotex*, or any other case relating to summary judgment principles." Pet. 7.

This argument is clearly a contrivance. The court of appeals properly applied the definition of "franchise" set forth in the Maryland Transportation Code to the GMC Truck Dealer Agreement between the parties. There was never any dispute as to the authenticity or substance of that Agreement; rather, the only issue was one of law — whether the Dealer Agreement constituted one "franchise," as maintained by GM, or several "franchises," as Central argued.

Central's claim that the Fourth Circuit "ignored" facts pertaining to whether the parties "treated the heavy duty business

as separate and distinct from the medium and light duty businesses" (Pet. 10) itself ignores the court of appeals' opinion. The court specifically considered and rejected Central's claim:

> Central also contends that it has a franchise in heavy duty trucks because GMC treated the sales and service of these trucks differently than it treated light and medium duty trucks. . . . We are unpersuaded, however. . . . The Maryland statute defines franchises not in terms of whether product lines occupy a distinct niche or are geared to different markets, but rather in terms of written arrangements and the license and right to use a trade name. To adopt Central's proposed approach is not only contrary to the statutory directive but it would also introduce substantial uncertainty into business relationships. . . . The language of the Maryland statute avoids these problems and leads us to the conclusion that GMC has discontinued a product but has not terminated a franchise.

946 F.2d at 332 (citation omitted). Accordingly, the court of appeals did not depart from the summary judgment standards enunciated by this Court. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment"). On the contrary, it appropriately concluded that the issues raised by Central were not material to the determination of Central's "franchise" under Maryland law.[8] Such a determination within

[8] Contrary to Central's assertion, at no time did GM concede the existence of disputed issues of *material* fact. Rather, GM consistently maintained that Central's proffered evidence of the distinctiveness of heavy duty truck models was irrelevant, but in any event, disputed. The fact that GM disputed irrelevant facts obviously did not preclude summary judgment in its favor.

the particularized factual context of this case is not a proper subject of review by this Court *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Likewise, Central's exaggerated claim as to the public impact of the decision below does not justify this Court's review. Central asserts that the court of appeals' decision "has eviscerated" the applicable provision of Maryland's Transportation Code, "rendering it impotent." Pet. 19. Central warns that "if the ruling in this case is permitted to stand, the legislatures of those states in [the Fourth] Circuit will be powerless to prevent manufacturers from imposing the costs of their business decisions upon their dealers." *Id.* Ultimately, according to Central, the opinion below "alarmingly impacts upon the rights of every person in the United States who has substantially invested in a franchise." *Id.*

This fantastic "parade of horribles" imagined by Central has no basis in reality. The decision below held only that the GMC Truck Dealer Agreement between the parties constituted a single franchise. It will have little, if any, practical effect on anyone other than the parties herein and, perhaps, a handful of GMC truck dealers who make claims similar to Central's under analogous statutes in other states. The decision neither "eviscerates" the regulation, nor does it render the Maryland General Assembly (or judiciary) "powerless" to change it. Moreover, Central's claim that the Fourth Circuit's decision will have a substantial and adverse public impact is belied by the fact that numerous states (and Congress) have adopted

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> The contention of one party that there are no issues of material fact preventing entry of judgment in its favor does not bar that party from asserting that there are issues of fact sufficient to prevent the entry of judgment as a matter of law against it.

Schwabenbauer v. *Board of Education*, 667 F.2d 305, 313 (2d Cir. 1981).

legislation which specifically recognizes a manufacturer's right to discontinue products.[9] Central's argument is without merit and provides no basis for granting the Petition.

II. The Decision Below Does Not Conflict With Any Decision by Another Court of Appeals

Central disingenuously claims that the decision below conflicts with the Second Circuit's opinion in *Arthur Glick Truck Sales, Inc.* v. *General Motors Corp.*, 865 F.2d 494 (2d Cir. 1989). The *Glick* decision is obviously distinguishable in that the statute *sub judice* in the Second Circuit was a different regulation adopted by a different state: New York Vehicle and Traffic Law, Section 462(6).[10] The fact that the Second Circuit

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[9] *See, e.g.*, Ill. Rev. Stat. c.121-½, § 754(d)(6)(c) (no violation of state franchise law where "manufacturer permanently discontinues the manufacture or assembly of motor vehicles of such line make"); Iowa Code Ann. § 322A.2 (franchisor may discontinue "a particular line-make" of motor vehicles); Maine Rev. Stat. Ann. tit. 10, § 1174(P)(4) (manufacturer entitled to "discontinu[e] production or distribution of the franchise product"); Missouri Ann. Stat. § 407.825(5)(b) (exempting "the discontinuance of the sale in the state of Missouri of such motor vehicle franchisor's products"); Neb. Rev. Stat. § 60-1420 ("a franchisor may terminate a franchise for a particular line-make if the franchisor discontinues that line-make"). *See also Jim Barnett Motors, Inc.* v. *Ford Motor Co.*, 355 F.2d 502 (5th Cir. 1966) (Ford's discontinuation of the Edsel did not violate the Federal Automobile Franchise Dealers Act, 15 U.S.C. § 1221, *et seq.* (1956)); *Jimenez* v. *BP Oil, Inc.*, 853 F.2d 268 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989) (market withdrawal by petroleum franchisor did not violate the Federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.* (1982)).

[10] The *Glick* case is also distinguishable in terms of its procedural context. At the outset of that case, plaintiff filed a motion for preliminary injunction. GM opposed the motion and simultaneously filed a motion to dismiss. The district court converted the motion to dismiss into a motion for summary judgment, which was granted. The case thus came to the Second Circuit without any discovery having been taken. The Second Circuit concluded that the dealer was "entitled to discovery and trial *if necessary* to determine whether the heavy-duty truck line was a separate franchise, whether General Motors terminated Glick's franchise without due cause, and whether General Motors breached its contract with Glick." 865 F.2d at 497 (emphasis added). By the

interpreted the New York regulation to reach a different result than that of the Fourth Circuit plainly does not create a conflict between the Circuits. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (certiorari will be granted only "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal"). Nor does either decision, as discussed above, raise any important federal question. For these reasons as well, this case does not merit further review by this Court.[11]

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phrase "if necessary," the Second Circuit recognized that summary judgment might be appropriate once the plaintiff had an opportunity for discovery.

[11] There is likewise no conflict between the decision below and the Third Circuit's decision in *Cassidy Podell Lynch, Inc.* v. *SnyderGeneral Corp.*, 944 F.2d 1131 (3d Cir. 1991). *See* Pet. at 8, 14 n.7. That case involved neither the Maryland Transportation Code nor summary judgment standards. Rather, the Third Circuit simply upheld a jury verdict finding that the plaintiff had been awarded a "franchise" by the defendant within the meaning of the New Jersey Franchise Practices Act, N.J. Stat. Ann. § 56:10-1, *et seq.* Likewise, *Johnson* v. *Oroweat Foods*, 785 F.2d 503 (4th Cir. 1986), cited by Central, presents no conflict. Even if it did, conflicts within a single Circuit do not provide a basis for granting the Petition. *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 7, 1992

Appendix

Companies Listed Pursuant to Supreme Court Rule 29.1

AC Bakony Kft. (Hungary)
Alpha Mariah, Inc. (USA)
Asset Leasing GmbH (Germany)
Atlantic Satellites, Ltd. (Ireland)
Aura s.r.1. (Italy)
Banque de Credit General Motors (France)
Beijing International Information Processing Company Limited (Peoples Republic of China)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (Germany)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG (Germany)
Comlinear Corporation (USA)
Convesco Vehicles Sales GmbH (Germany)
DRB s.a./n.v. (Belgium)
Diavia s.p.A. (Italy)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
GM Allison Japan Limited (Japan)
G.M.A.C. Financiera de Colombia, S.A. Compania de Financiamiento Comercial (Colombia)
General Motors Bankgesellschaft mbH (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Hungary Automotive Distribution Limited Liability Company (Hungary)
(a/k/a General Motors Hungary (Distribution) Ltd.
General Motors Hungary Automotive Manufacturing Limited Liability Company (Hungary)
(a/k/a General Motors Hungary (Manufacturing) Ltd.

HBC (USA)
IBC Vehicles Limited (United Kingdom)
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)
Kabelwerke Reinshagen GmbH (Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (Germany)
Kabelwerke Reinshagen Werk Newmarkt GmbH (Germany)
LEA GP Incorporated (USA)
Metal Casting Technology, Inc. (USA)
Millbrook Pension Management Ltd. (England)
Neodata Holdings, Inc. (USA)
Nippon EDS, Ltd. (Japan)
Opel-Automobilwerk Eisenach-PKW GmbH (Germany)
Opel-Wohnbau GmbH (Germany)
Packard CTA Pty. Ltd. (Australia)
Packard Electric Vas kft (Hungary)
Societe Francaise des Amortisseurs de Carbon S.A. (France)
Truck and Bus Engineering U.K., Limited (USA)